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Supreme Court,
FILED

95 1478 MAR 15 1996

OFFICE OF THE CLERK

No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JAY PRINTZ, Sheriff/Coroner,
Ravalli County, Montana,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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135 pp

QUESTION PRESENTED

Whether Congress has power under Article I, §8 of the Constitution, consistent with the Tenth Amendment as interpreted in *New York v. United States*, 505 U.S. 144 (1992), to command State-created chief law enforcement officers: to search records and to ascertain whether persons may lawfully purchase handguns; to destroy records concerning handgun purchasers; and to provide the reasons for adverse determinations, as mandated by the Brady Act, 18 U.S.C. §922(s)(2), (6)(B) and (C).

PARTIES TO PROCEEDING

The parties to the proceeding in the Court of Appeals were Sheriff/Coroner Jay Printz and the United States. There are no parent companies and nonwholly owned subsidiaries to be listed.

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PETITION FOR A WRIT OF CERTIORARI
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OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995) and is reproduced in the Appendix ("App.") at 1a. The opinion of the United States District Court is reported as *Printz v. United States*, 854 F.Supp. 1503 (D.Mont. 1994) and is reproduced in the Appendix at 30a.

JURISDICTION

On September 8, 1995, the Court of Appeals affirmed in part, reversed in part, and dismissed in part the judgment of the District Court, thereby upholding the validity of the statutory provisions in question. On December 19, 1995, the Court of Appeals denied Sheriff Printz' petition for rehearing and suggestion for rehearing en banc. The jurisdiction of this

Court is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the following constitutional provisions and statutes are reproduced in the Appendix:

U.S. Const., Art. I, § 8, cl. 3

U.S. Const., Amend. X

Brady Handgun Violence Protection Act, Pub. L. 103-159, 107 Stat. 1536 (1993) (18 U.S.C. § 922(s), (r))

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Petitioner Sheriff/Coroner Jay Printz is a chief law enforcement officer ("CLEO") commanded by 18 U.S.C. § 922(s) to perform background checks and make legal judgments concerning handgun purchases. His complaint against the United States sought a declaratory judgment that § 922(s) is inconsistent with Art. I, § 8 and the Tenth Amendment to the United States Constitution.

The District Court held that § 922(s)(2) is unconstitutional under Art. I, § 8 and the Tenth Amendment, but upheld the remainder of § 922(s). (App. at 66a.) Following *New York v. United States*, 505 U.S. 144 (1992), the court found that the ascertainment/background check requirement "substantially commandeers state executive officers and indirectly commandeers the legislative processes of the state to administer a federal program." (App. at 66a)

The District Court permanently enjoined the United States from enforcing § 922(s)(2) against plaintiff or any other chief law enforcement officer. On November 1, 1994, the court denied defendant's motion to limit the injunction solely to plaintiff. On December 16, 1994, the court partially granted defendant's motion for relief by limiting the scope of the injunction to the District of Montana.

Both the plaintiff and the defendant appealed. This case was heard jointly with the appeal of *Mack v. United States*, 856 F.Supp. 1372 (D.Ariz. 1994). Federal jurisdiction in the Court of Appeals was based on 28 U.S.C. § 1291.

The Court of Appeals, in a 2-1 opinion (Judge Fernandez dissenting), upheld the constitutionality of § 922(s) in its entirety, reversing the judgment of the District Court to the extent it held § 922(s)(2) unconstitutional. The Court of Appeals thereafter denied Sheriff Printz' petition for rehearing and suggestion for rehearing en banc. (App. at 28a)

(ii) Facts

Sheriff/Coroner Jay Printz, pursuant to Mont. Const., art. XI, § 3, is the chief law enforcement officer of Ravalli County, Montana. Montana Code § 7-32-2121 provides that the sheriff must preserve the peace, arrest all persons who have committed a public offense, suppress riots, attend court and obey court orders, keep the detention center, and take charge of search and rescue units.[1]

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[1] Printz is also the county coroner, whose duties are defined in Mont. Code § 7-4-2911.

The sheriff's staff includes an undersheriff, 4 detectives, a lieutenant, a patrol sergeant, and 7 deputies. There are 30,000 residents of Ravalli County, which is 2400 square miles. On average, two deputies are on patrol at any given time. Urgent responses and investigations make it difficult to conduct routine patrol. "If I am now compelled to perform background checks of our residents, it will have to be done by pulling deputies off patrol and investigation duties." (Printz Aff., ¶ 7.)

Sheriff Printz described various records the Brady Act requires to be searched (Aff. ¶5), including the following:

> **NCIC**: Electronically retrievable but only reflects warrants.
> **CJIN**: Includes records of convictions, but only from Montana courts. Many Ravalli County residents moved there from out of state. Does not include restorations of civil rights.
> **County Court Criminal Records**: These could be handsearched for criminal convictions and restorations of rights. Record searches in other counties would require as much as six hours driving time one way.
> **State Hospital Records**: Records of mental commitments are three hours driving time away and may not be accessible.
> **County Court Civil Records**: Records of persons adjudicated as mental defectives and persons found to be a danger to self or others exist in all counties.
> **Veteran's Hospital**: Mental and drug records are kept at the veteran's hospital three hours driving time away and may not be accessible.

> **Drug Use**: Such evidence is found in law enforcement and misdemeanor court records and medical and drug treatment records.

A background check might require anywhere between an hour to several days. There are 169 licensed firearms dealers in Ravalli County. Residents also purchase handguns in the other 55 counties of Montana. (¶ 6.)

Sheriff Printz has no mechanism for carrying out the duties assigned by § 922(s) and no provision in the budget authorizing the expenditures. A county official is personally liable for expending funds without authorization. (¶ 8.)

Carrying out the duties of § 922(s) conflicts with Mont. Code § 45-8-351(1), which provides:

> No county . . . or other local government unit may prohibit, register, tax, license, or regulate the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, [or] possession . . . of any weapon, including a rifle, shotgun, handgun, or unconcealed handgun.

§ 922(s) would have the following effect: "The citizens of Ravalli County will be harmed by a significant reduction in patrol strength and the availability of law enforcement personnel for crime prevention, investigation, and response." (Printz Aff. ¶ 10.)

At the district court hearing on April 7, 1994, Sheriff Printz described severe manpower shortages in the department, which ranked second to last in Montana for

officer-to-citizen ratios. (CR 29, RT 16.)[2] He described a litany of never-ending brush fires which strained the department's personnel and budget, from mental patient transport and extraditions to burglaries and drug investigations. (RT 18, 35-36.) No time existed for traffic and DUI control (RT 19), and there was an unsolved homicide. (RT 35) If he carried out the duties imposed by the Brady Act, Sheriff Printz testified, he would not be able to respond to "a domestic abuse in progress, or any number of serious things." (RT 20.)

The Sheriff's Office Annual Report describes a crises in manpower and funding for the department, noting:

> We are increasingly being asked, and sometimes ordered, to do more with less as evidenced by the "Brady Law". . . . We are, however, utilizing our patrol vehicles long past their safe limits, the DARE program grant is running out and we are burning out our employees and volunteers . . . . (Ex. 3, CR 28.)

Sheriff Printz did not personally know 80% of the County's residents. (RT 35) BATF forms received by his department indicated that out of 101 proposed handgun sales, 83 of the purchasers were born out of State. (Ex. 1, CR 28, & RT 24.) Approval based on an NCIC search is insufficient. If he approved a person who later committed a crime, the sheriff would be blamed. (RT 34.)

Based on the above evidence, which the government did not dispute, the District Court found:

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[2] "CR" refers to the Clerk's Record, and "RT" refers to the Reporter's Transcript.

> The impact of the mandates of the Act is far from *de minimis*. The ascertainment/background check provision is most burdensome. CLEOs must perform these background checks on every potential transferee, must determine the applicable law on which the ascertainments are made, and must determine whether each transfer violates the law. These are substantial undertakings, some involving the exercise of discretion, which may be performed--if at all--only with great effort and the expenditure of unfunded resources. (App. at 60a)

ARGUMENT

THE WRIT SHOULD BE GRANTED TO CLARIFY WHETHER CONGRESS, CONSISTENT WITH COMMERCE CLAUSE AND THE TENTH AMENDMENT, MAY CONSCRIPT LOCAL LAW ENFORCEMENT OFFICERS TO ENFORCE FEDERAL CRIMINAL LAWS, AND BECAUSE THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH *NEW YORK V. UNITED* STATES, 505 U.S. 144 (1992).

The Ninth Circuit's decision defies this Court's holding in *New York v. United States*, 505 U.S. 144, 120 L.Ed.2d 120, 112 S.Ct. 2408 (1992) that Congress may not command the States to enact or administer a federal regulatory program. Since the decision shakes the structure of federalism to its foundations, this case presents an important federal question that this Court should decide. This Court should grant certiorari to clarify whether

Congress, consistent with its powers under the commerce clause and with the Tenth Amendment, may conscript local law enforcement officers to enforce federal criminal laws.

Five of six district courts held that 18 U.S.C. § 922(s)(2), which orders CLEOs to search "available" records and to ascertain the legality of handgun transactions, violates the Tenth Amendment as interpreted in *New York*.[3] In a 2-1 opinion (Judge Fernandez dissenting, App. at 22a), the panel in the instant case reversed two of those decisions, *Printz* and *Mack*, and upheld the Act.

I. DUTIES IMPOSED BY THE BRADY ACT

a. Statutory Text

Effective on February 28, 1994, § 102(a) of P.L. 103-159, 107 Stat. 1536 (1993) amended 18 U.S.C. to create § 922(s). (App. at 75a.) § 922(s)(1)(A) makes it unlawful for a federally licensed firearms dealer to transfer a handgun

[3] In addition to the district court decisions in *Printz* and *Mack*, the Brady command was declared unconstitutional in *Romero v. United States*, 883 F.Supp. 1076 (W.D.La. 1995) (also holding § 922(s)(6)(B) and (C), which require the destruction of records and letters of explanation to persons determined ineligible to receive a handgun, unconstitutional); *Frank v. United States*, 860 F.Supp. 1030 (D.Vt. 1994), *appeal filed*, No. 94-6019(L) (2nd Cir., argued Aug. 28, 1995); *McGee v. United States*, 863 F.Supp. 321 (S.D.Miss. 1994), *appeal filed*, No. 94-60518 (5th Cir.). *Contra, Koog v. United States*, 852 F.Supp. 1376 (W.D.Tex. 1994), *appeal filed*, No. 94-50562 (5th Cir.). The only district court to uphold all of § 922(s), *Koog*, stated that Supreme Court precedents are "contradictory" and that *New York* makes "logical leap[s]." *Id.* at 1381, 1386 n. 20. *McGee* and *Koog* were argued before the Fifth Circuit on June 7, 1995.

without obtaining a statement of personal information from the transferee and transmitting a copy to the chief law enforcement officer ("CLEO") where the transferee resides.[4] The dealer may transfer the handgun after five days, unless he receives notice from the CLEO that the purchaser is ineligible.[5]

Three duties are imposed on the CLEO. First, § 922(s)(2) provides:

> A chief law enforcement officer to whom a transferor has provided notice . . . shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.[6]

The second duty is imposed by § 922(s)(6)(B), which provides as follows:

> Unless the chief law enforcement officer to whom a statement is transmitted . . . determines that

[4] § 922(s)(8) provides that "the term 'chief law enforcement officer' means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual."

[5] The handgun may be transferred earlier than five business days if the dealer receives appropriate notice from the CLEO.

[6] The Attorney General has designated "the National Crime Information Center (NCIC) as the national system to be used by law enforcement for crime history record background checks." 59 F.R. 9498 (Feb. 28, 1994).

> a transaction would violate Federal, State, or local law--(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required . . . .

The third command is made by § 922(s)(6)(C), which states as follows:

> If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide the reasons to the individual in writing within 20 business days after receipt of the request.

The States may exempt themselves from these duties by enacting laws in conformity with Congress' directives set forth in § 922(s)(1)(C)[7] or (D).[8] The federal Bureau of Alcohol, Tobacco and Firearms (BATF) asserts the power "to determine which States are subject to the federal waiting period provisions and which qualify as 'alternative' States." 59 F.R. 37532, 37533-34 (July 22, 1994) (finding half the States exempt by reason of "instant check" or "permit or

[7] This provision exempts handgun purchases where the transferee has a permit to possess a handgun issued by the State within the previous five years, and State law provides that an official determine the lawfulness of possession of a handgun by the permit applicant.

[8] This provision exempts States with laws requiring officials to verify that a person's handgun possession would not violate the law.

other approval type system").[9]

Numerous records must be researched to ascertain whether receipt of a handgun would violate federal law. § 922(g) provides:

> It shall be unlawful for any person--
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to any controlled substance . . . ;
>
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
>
> (5) who, being an alien, is illegally or unlawfully in the United States;
>
> (6) who has been discharged from the Armed Forces under dishonorable conditions;
>
> (7) who, having been a citizen of the United States, has renounced his citizenship; or
>
> (8) [who is subject to certain restraining orders involving an intimate partner]
>
> to . . . possess in or affecting commerce, any firearm

[9] The fact that the Brady Act subjects the legislative processes of the States to federal approval or disapproval is starkly evident in *Mack*. The Arizona legislature passed an instant check, but it did not meet with BATF's approval. (*Mack* Transcript of Proceedings, May 31, 1994, at 60-62.)

. . .; or to receive any firearm . . . which has been shipped or transported in interstate or foreign commerce.[10]

To determine whether a person has been indicted for or convicted of a crime punishable by imprisonment for a term exceeding one year, a CLEO must search arrest, conviction, and appellate records and records of pardons, expungements, and restorations of civil rights. The definition of "convicted" under § 921(a)(20) requires the CLEO to research the laws of potentially all fifty states and federal law.[11]

Medical, drug treatment, and police records must be searched to determine if a person is an unlawful user of a controlled substance. Medical and judicial records must be searched to determine if a person has been adjudicated as a mental defective or committed to an institution. Records of fugitives, dishonorable discharges, and ex-citizens must be searched. Records of restraining orders involving intimate persons (e.g., in domestic relations cases) must be searched. Records must be searched to determine whether the handgun

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[10] In addition, § 922(n) makes it "unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to . . . receive any firearm . . . which has been shipped or transported in interstate or foreign commerce."

[11] *United States v. Gomez*, 911 F.2d 219, 220-21 (9th Cir. 1990) ("we look to the whole of state law," i.e., the rights to vote, hold office, and sit on a jury, to determine whether a felon's rights are restored); *United States v. Eaton*, 31 F.3d 789, 792 (9th Cir. 1994) (applying North Dakota law to Montana resident); *Beecham v. United States*, 114 S.Ct. 1669 (1994) (federal convictions).

to be purchased had ever been transported in interstate commerce, without which § 922(g) does not apply.[12]

b. Legislative History

The legislative history confirms the mandatory character of the duties imposed. "Local law enforcement officials are required . . . to determine whether a prospective handgun purchaser has a felony conviction or is otherwise prohibited by law from buying a gun." H.R. Rep. No. 103-344, 103rd Cong., 1st Sess. at 7 (1993). The Committee rejected Rep. Schiff's amendments to require the FBI to conduct the checks, to reimburse the state or local agency for the costs of performing checks, or to "strike ['shall'] and insert 'may,' thus making it an option for state and local agencies who do have the law enforcement resources to perform the background check, to do so." *Id.* at 38-39. Rep. Schumer, chief sponsor of the bill, opposed Schiff's amendment because localities or States "wouldn't do the check." Trans. of Markup on H.R. 1025, Committee on Judiciary, U.S. House of Representatives, 103rd Cong., 1st Sess. (1993).

On the House floor, Schiff explained that H.R. 7, the previous version of the Brady bill, had provided that the background check was an option which "shall not be interpreted to require any action by a chief law enforcement officer which is not otherwise required." The new version deleted this and would impose "an unfunded mandate on the

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[12] To determine whether one has received relief from disabilities under § 925(c), the Federal Register and court records must be searched.

local police departments in this country."[13] 139 CONG. REC. H9093 (Nov. 10, 1993). Schiff requested a vote on his proposal for "not requiring the local police to do the check." *Id.* at H9094.

Rep. Hughes responded that it must remain "mandatory." *Id.* at H9095. Rep. Zimmer verified that "the background check is no longer optional." *Id.* at H9107-08. Rep. Sensenbrenner added that the mandate included checks not only on felons but also on "adjudicated mental incompetents." *Id.* at H9093.

The same sentiments were repeated in the Senate. Senator Moseley-Braun stated that the bill "requires local law enforcement officials to conduct background checks on handgun purchasers." 139 CONG. REC. S16414 (Nov. 19, 1993). No question existed that the duties imposed on CLEOs were mandatory.

II. CONGRESS HAS NO POWER TO IMPOSE DUTIES ON CHIEF LAW ENFORCEMENT OFFICERS

A. This Court's Decision in *New York v. United States*

Article I, § 8 of the Constitution delegates no power to Congress to issue commands to local law enforcement officials, and the Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

[13] H.R. Rep. No. 102-47, 102nd Cong., 1st Sess. at 12, 15 (1991) confirmed that under H.R. 7 "no duty is created for the chief of police."

respectively, or to the people."

The three duties imposed on CLEOs by § 922(s) are squarely invalid under these provisions for the reasons explained by *New York v. United States*, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), which held:

> State governments are neither regional offices nor administrative agencies of the Federal Government. . . . The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, . . . reserved explicitly to the States by the Tenth Amendment.
>
> Whatever the outer limits of that sovereignty may be, one thing is clear: *The Federal Government may not compel the States to enact or administer a federal regulatory program.* 112 S.Ct. at 2434-35 (emphasis added).

The statute required the States either to "enact" a program to dispose of radioactive waste according to Congress' directives, or to "administer" the program by taking title to and possession of the waste and by being liable for damages. 112 S.Ct. at 2416. Here too, the States must administer Congress' program or enact their own.

New York analyzed previous opinions stating that States cannot be ordered to "enact *and* enforce" federal programs. *Id.* at 2420, quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981). The statute in *Hodel* was constitutional because "the States

are not compelled to enforce [federal] standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Id.*

New York noted that the statute in *FERC v. Mississippi*, 456 U.S. 742, 764 (1982) "require[d] *only* consideration of federal standards. And if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals." 112 S.Ct. at 2420-21. Indeed, "Congress could have preempted the field." *FERC*, 456 U.S. at 765. The two challenged Titles were upheld because they "simply *condition* continued state involvement in a pre-emptible area on the consideration of federal proposals." *Id.* Further, the commission in *FERC* was part of the "state adjudicatory machinery" and thus was subject to Article VI of the Constitution, under which State judges are bound by federal law. *Id.* at 761-62.

As *New York* explains, the Framers of the Constitution rejected a proposal to require State officers to enforce federal laws:

> Under one preliminary draft of what would become the New Jersey Plan, state governments would occupy a position relative to Congress similar to that contemplated by the Act at issue in this case: "[T]he laws of the United States ought . . . to be carried into execution by the judiciary and executive officers of the respective states, wherein the execution thereof is required." . . .
>
> In the end, the Convention opted for a Constitution in which Congress would exercise its authority directly over individuals rather than over States; for a variety of reasons, it rejected the New Jersey Plan in favor of the Virginia Plan. 112 S.Ct. at 2422.

As this Court concluded, the Constitution

> confers upon Congress the power to regulate individuals, not States. . . . Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. *Id.* at 2423.

If a CLEO does not search records and opine that a purchase is lawful, his constituents who purchase handguns must wait the full five business days; if the CLEO does not destroy the records, he violates his constituents' privacy rights. As *New York* explains, this blurs responsibility:

> Where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. *Id.* at 2424.

Congress may offer financial incentives which give States the option not to do anything,[14] but it may not force

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[14] *Id.* at 2423. "If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." *Id.* at 2424. *See South Dakota v. Dole*, 483 U.S. 203 (1987) (statute may condition receipt of highway funds on minimum drinking age of 21). No such choice exists here.

the States to act or to spend:

> A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy . . . . The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile. *Id.* at 2427.

Both here and in *New York*, Congress gave the States the "choice" either of enacting legislation ("regulating pursuant to Congress' direction") or of administering the laws Congress wrote. *Id.* This Court explained:

> Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments. . . .
>
> Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. *Id.* at 2428.

Like its argument that the Brady Act allows a sheriff to decide what is a "reasonable" check, the government in *New York* emphasized "the latitude given to the States to implement Congress' plan." *Id.* Yet this "only underscores the critical alternative a State lacks: A State may not decline

to administer the federal program." *Id.* at 2428-29.

Nor does the importance of the federal interest justify the means: "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Id.* at 2429. Federal courts have power to order state officials to comply with duties imposed by the federal Constitution or a valid federal statute. *Id.* at 2430, citing *Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987) (extradition statute passed pursuant to Article IV, § 2 of the Constitution). However, the Constitution "contains no analogous grant of authority to Congress." *Id.* at 2430.

This Court has upheld economic regulations which govern both public and private actors.[15] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (upholding minimum wage laws applicable to private and public sectors alike under Commerce Clause). The Brady Act does not command all citizens to check records, destroy records, or explain denials--it directs those commands solely to the CLEOs. As *New York* states:

> This case presents no occasion to apply or revisit the holdings of any of these cases [such as *Garcia*], as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties. (112 S.Ct. at 2420.)

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[15] *Cf. South Carolina v. Baker*, 485 U.S. 505, 507-08 (1988) (Act removed tax exemption for interest on unregistered State bonds; no command to States involved).

Bowen v. American Hospital Assn., 476 U.S. 610 (1986) invalidated federal regulations which sought to commandeer State agencies. *Bowen* described the federal commands as follows:

> The Rules effectively make medical neglect of handicapped newborns a state investigative priority, possibly forcing state agencies to shift scarce resources away from other enforcement activities . . . . The Rules also order state agencies to "immediately" review reports from hospitals, . . . to conduct "onsite investigations" . . . . *Id.* at 639.

The Brady Act makes handgun transfers "a state investigative priority," forcing CLEOs "to shift scarce resources away from other enforcement activities," and requiring them to "review reports" of records and to conduct "investigations." *Bowen* explained: "State child protective services agencies are not field offices of the HHS bureaucracy, and they may not be conscripted against their will as the foot soldiers in a federal crusade." *Id.* at 642.

So too, sheriffs are not field offices of the BATF bureaucracy, and they may not be conscripted against their will as the foot soldiers in a federal crusade.

B. The Ninth Circuit's Decision Conflicts with *New York*

The panel majority rewrites *New York*'s holding--that Congress "may not compel the States to enact or administer a federal regulatory program," 112 S.Ct. at 2434-35--to say that Congress may not "direct the States to enact their own legislation or regulations according to a federal formula."

(App. at 10a.) This considers only the prong of *New York* prohibiting Congress from ordering the States to "enact a federal regulatory program," and ignores the prong holding that Congress is prohibited from commanding the States to "administer a federal regulatory program."

The Ninth Circuit asserts that *New York* "meant 'administer' in the sense of being in charge of a program and making policy decisions with respect to the program." (App. at 13a n. 7.) Yet the Brady Act puts CLEOs in charge of its program and forces them to search records and to make legal determinations applying the laws of the United States and all 50 States, which involve policy decisions. "Administer," moreover, includes the routine execution of a law,[16] such as searching records here or taking title to waste in *New York*. This Court did not restrict its holding to requiring the passage of regulations when it ruled that Congress "may not conscript state governments as its agents." *New York* at 2429.

After rewriting "enact or administer" to read "legislate or regulate," the panel majority paints the further gloss that the Tenth Amendment concern is with "federal coercion of a State's enactment of legislation or regulations or creation of an administrative program." (App. at 13a.) The prong related to the administration of a federal regulatory program" is now obliterated; all that is left is its enactment.

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[16] The "administration" of the Gun Control Act is vested in the Secretary of the Treasury, § 103, P.L. 90-618 (1968), and includes issuing licenses, conducting checks on firearm transferees, and other duties similar to those in the Brady Act. 18 U.S.C. § 923; 26 U.S.C. § 5812.

The implications of the panel majority's view are staggering. Besides CLEOs, the entire workforce of the States and their political subdivisions may be conscripted for federal crusades.[17] As long as the "interference with their state duties is minimal" as defined by the federal judiciary (App. at 14a.), every State, county, and local official and employee, from the governor to the school teachers, may be ordered to execute federal laws.[18] This ruling contradicts *New York* to the core.

The panel majority asserts that CLEOs need do no more than check computer records and explain denials. (App. at 16a.) Yet § 922(s)(2) commands that a CLEO shall ascertain legality based on "research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." Only the national system is computerized, and it allows checks for criminal records only. 59 F.R. 9498 (Feb. 28, 1994). The panel majority's cavalier approach to the broad command about what CLEOs "shall" do is contrary to *Board of Natural*

[17] Arguing that *New York* was wrongly decided, S. Prakash, *Field Office Federalism*, 79 VA.L.REV. 1957, 1960, 2006 n. 247 (1993), one of the government's authorities in the court below, contended that "state tax collectors could be drafted into the service of the Internal Revenue Service. Local police could enforce federal criminal and civil law."

[18] Indeed, *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied* 64 U.S.L.W. 3501 (1996), upheld, under U.S. Const., Art. I, § 4, Congress' command that social workers, division of motor vehicle employees, and other State employees administer federal voter registration. The Court asserted that the Elections Clause, "unlike the commerce power in Article I, section 8, empowers Congress to impose on the states precisely the burden at issue." *Id.* at 1414. The panel in the case at bar disregarded this holding.

Resources v. Brown, 992 F.2d 937, 947 (9th Cir. 1993), which rejected the government's argument the statute involved "precatory admonitions rather than commands to the states," ignoring "the power of federal *courts* to order State officials to comply with federal law." *Id.*, citing *New York*.

Brown invalidated federal commands that States administer federal timber-export policies. The panel majority sought to distinguish that case on the basis that the Act there "required the States to issue regulations." (App. at 16a.) In fact, the Act in *Brown* mandated that the executive branch both carry out purely administrative tasks[19] *and* issue regulations to remain in effect until the State legislature acted.[20] *Id.* at 947.

Previously, the Ninth Circuit recognized that "the federal government has no authority to interfere with a state's exercise of its police power," *United States v. Snyder*, 852 F.2d 471, 474-75 (9th Cir. 1988) (federal court may not direct a State DMV to suspend a driver's license, even though "de minimus").[21] The Ninth Circuit is in disarray.

[19] The Act required that "each State *shall* determine the species, grade, and geographic origin of unprocessed timber to be prohibited from export" and "*shall* administer such prohibitions." 992 F.2d at 947.

[20] "This provision of the Brady Act, like the offending provision of the Forest Resources Conservation Act, unconstitutionally intrudes upon state autonomy." D. Merritt, *Three Faces of Federalism*, 47 VANDERBILT LAW REV. 1563, 1580 (1994) (comparing *Brown* with district court decisions in *Printz* and *Mack*). Merritt's writings on federalism are cited with approval in *New York*, 112 S.Ct. at 2424.

[21] *Snyder* followed *United States v. Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978), which held that a federal order to a State to suspend a

C. The Commands are not Authorized by any Enumerated Power

Nothing in § 922(s) or its legislative history suggests any enumerated power in the Constitution which justifies imposition of its commands to CLEOs. The power to regulate interstate commerce does not include a power to conscript CLEOs. The Constitution delegates the enforcement of federal law to the President, who has the power of appointment and removal. The Constitution is explicit concerning limited duties of the States vís-a-vís federal law enforcement.

1. The Commerce Clause Does Not Justify the Commands

Art. I, § 8 of the Constitution delegates no power to Congress to issue the commands here. If one speculates that Congress sought to exercise its power to regulate interstate commerce, no court has ever held that Congress may do so by drafting State-created CLEOs, who are not engaged in interstate commerce. The commerce clause "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York*, 112 S.Ct. at 2423. *"A fortiori* [the commerce clause] does not allow federal regulation of the states' CLEOs' methods of law enforcement as a method of regulating interstate commerce." *Romero v.*

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driver's license violates the Tenth Amendment. The panel majority here (App. at 16a) rejects *Best* because it relied on *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled, Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985). The panel showed no awareness of *Snyder*, which held that *Best* survived *Garcia*. 852 F.2d at 475 n. 3.

United States, 883 F.Supp. 1076, 1082 (W.D.La. 1995) (declaring Brady Act commands unconstitutional).

United States v. Lopez, 115 S.Ct. 1624, 1626 (1995) declared the federal prohibition on a firearm at a school unconstitutional because "the Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." The same is true here--being a CLEO is not a commercial activity and the Brady commands have no nexus to interstate commerce.[22]

The Constitution empowers Congress (1) to "regulate the use of the channels of interstate commerce," (2) "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "to regulate those activities having a substantial relation to interstate commerce." 115 S.Ct. at 1629-30. Being a CLEO is none of the above.

Nor can it be argued that commerce is affected if CLEOs do not conduct Brady checks, because *Lopez* rejected the argument that "Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* at 1632. The government's theory entailed no "limitation on federal power, even in areas such as

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[22] *See United States v. Minnick*, 949 F.2d 8, 10-11 (1st Cir. 1991), *cert. denied*, 503 U.S. 995 (1992) (Tenth Amendment not violated by prohibition on felon's receipt of firearm transported in interstate commerce because "the statute is not directed at states as such, but at individual behavior").

criminal law enforcement . . . where States have historically been sovereign." *Id.* 1632. Being sovereign in criminal law enforcement, of course, means that the States (including their CLEOs) do not take orders from Congress. This is why the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Id.* at 1633. The government's theory would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 1634.

Lopez makes clear that the Brady Act is an unconstitutional imposition on the States, which are the primary jurisdictions engaged in the administration of criminal law enforcement:

> The "'States possess primary authority for defining and enforcing the criminal law.'" . . . "Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States . . . ."

Id. at 1631 n. 3 (citations omitted). The Brady Act violates the Tenth Amendment because it "control[s] *States' methods* of enforcing their own and federal criminal statutes concerning possession of handguns" and regulates CLEOs' law enforcement methods, which is "an essential element of state sovereignty: maintenance of public order." *Romero*, 883 F.Supp. at 1081.

In sum, § 922(s) issues commands to State-created chief law enforcement officers, who are not engaged in interstate commerce. § 922(s) was thereby beyond Congress'

power to enact under Article I, § 8, and violates the Tenth Amendment.

2. The President and the Executive Branch, Not State CLEOs, are Responsible for the Execution of Federal Law

Art. II, § 1 begins: "The executive power shall be vested in a President of the United States of America." § 3 provides that the President--not State CLEOs--"shall take care that the laws be faithfully executed." Under § 2, cl. 2, "Congress may by Law vest the Appointment of such inferior Officers" in the President, courts, or in "Heads of Departments." Sheriff Printz has not been so appointed.[23]

Art. I, § 8, cl. 18 provides that Congress shall have power: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." The federal executive branch enforces Congress' laws, which

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[23] Justice O'Conner, joined by Justices Rehnquist, Stevens, and Brennan, opined in *Dixson v. United States*, 465 U.S. 482, 510 (1984) (dissenting from interpretation of criminal statute):

> A proper respect for the sovereignty of States requires that federal programs not be interpreted to deputize States or their political subdivisions to act on behalf of the United States unless such deputy status is expressly accepted or, where lawful, expressly imposed. It would be inconsistent with the general relationship between the Federal and State Governments to conclude, absent such express actions, that a State is acting in effect as an agent of the United States.

must be "necessary and *proper*."[24]

The Execution of the Laws, Appointments (and, by implication, removal), and Commission Clauses constitute an interrelated scheme to ensure constitutional accountability in the President. Needless to say, CLEOs are neither appointed nor commissioned by the President, nor can the President remove a CLEO for improper execution of, or failure to enforce, the law. The constitutional checks and balances are upset when Congress conscripts state officers.

The Constitution is explicit when it imposes duties on the States, and none of its provisions empower Congress to impose the commands here. Art. I, § 8, cl. 15 and 16, delegate power to Congress:

> To provide for calling forth the Militia to execute the Laws of the Union . . .;
>
> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the authority of training the militia according to the discipline prescribed by Congress . . . .

The Constitution is explicit where it delegates power

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[24] "An executory law that regulates subjects outside Congress's enumerated powers is not 'proper' and therefore not constitutional." G. Lawson and P. Granger, *The "Proper" Scope of Federal Power*, 43 DUKE L. JOUR. 267, 330 (1993).

to Congress to "call forth" State officials--here, State-appointed militia officers--"to execute the Laws of the Union." Congress is not empowered to call forth CLEOs "to execute the Laws of the Union," to "govern" them, or to prescribe their "discipline."

Article IV, § 2, cl. 2, provides that a fugitive "shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Since this creates a mandatory duty, a federal court may order a State governor to extradite a fugitive. *Puerto Rico v. Branstad*, 483 U.S. 219, 227-28 (1987). "Because the duty is directly imposed upon the States by the Constitution itself, there can be no need to weigh the performance of the federal obligation against the powers reserved to the States under the Tenth Amendment." *Id.* at 228.

The Constitution is explicit in other places when it requires State legislatures or executives to fulfill other duties. Art. I, §§ 2, 4 , Amendment XVII (election matters); Art. I, §10, cl. 2 (state duties on imports "shall be for the Use of the Treasury of the United States"). It also explicitly prohibits the States from coining money, engaging in war, and certain other activities, Art. I, §10, cl. 1, and from violating certain rights. Amendment XIV (due process, equal protection); Amendments XV, XIX, XXIV, and XXVI (voting rights).

"Under our federal system, the States possess sovereignty concurrent with that of the Federal Government." *New York*, 112 S.Ct. at 2421, quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1992). Congress has no power generally to

issue commands to State officials just as the States have no power to issue commands to federal officials. The duties of the State executive branches under the Constitution are explicitly enumerated in the Constitution, and these duties do not include administration of the Brady Act.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 94-16940/94-17002
D.C. No. CV-94-00113-JMR

RICHARD MACK, Sheriff of Graham County, Arizona,
Plaintiff-Appellee-Cross-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted
July 11, 1995 - San Francisco, California

Nos. 94-36193/95-35037
D.C. No. CV-94-00035-M-CCL

JAY PRINTZ, Sheriff/Coroner,
Ravalli County, Montana,
Plaintiff-Appellant-Cross-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee-
Cross-Appellant.

Appeals from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted
July 11, 1995 - San Francisco, California

OPINION
[Filed September 8, 1995]

Before: Herbert Y.C. Choy, William C. Canby, Jr., and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Canby; Partial Concurrence and Partial Dissent by Judge Fernandez

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James H. Warner, Fairfax, Virginia, for amicus Law Enforcement Alliance of America.

Randolph D. Moss, Wilmer, Cutler & Pickering, Washington, D.C., for amicus Handgun Control, Inc., et al.

OPINION

CANBY, Circuit Judge:

Sheriffs Richard Mack and Jay Printz, in separate actions, challenged the constitutionality of the Brady Handgun Control Act, P.L. 103-159, 107 Stat. 1536 (1993), codified at 18 U.S.C. § 922(s). The main issue on appeal concerns the district courts' respective holdings that section 922(s)(2) of the Brady Act, requiring local law enforcement officials to perform background checks of handgun purchasers, violates the Tenth Amendment. We conclude that the Act is constitutional, and we accordingly reverse the judgments of the district courts.

FACTS

The Brady Act, passed in 1993 as an amendment to the Gun Control Act of 1968, imposes a waiting period of up

to five days for the purchase of a handgun, and subjects purchasers to a background check during that period.[1] See 18 U.S.C. § 922(s)(1). Within five years from the effective date of the Act, such checks will be performed instantaneously through a national criminal background check system maintained by the Department of Justice, 18 U.S.C. § 922(t), but in the meantime the background checks must be performed by the Chief Law Enforcement Officer (CLEO) of the prospective purchaser's place of residence. 18 U.S.C. § 922(s)(2). The Act requires CLEOs to "make a reasonable effort to ascertain . . . whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law . . . ." Id. The CLEO performs the check on the basis of a sworn statement signed by the buyer and provided to the CLEO by a federally-licensed gun dealer. 18 U.S.C. § 922(s)(1)(A). If the CLEO approves the transfer, he or she must destroy the buyer's statement within twenty business days after the statement was made. 18 U.S.C. § 922(s)(6)(B)(i). If the CLEO disapproves the transfer, the CLEO must provide the reasons for the determination within twenty business days if so requested by the disappointed purchaser. 18 U.S.C. § 922(s)(6)(C).

Richard Mack and Jay Printz, as sheriffs, are the CLEOs in their respective jurisdictions of Graham County, Arizona, and Ravalli County, Montana. They brought these actions in their local federal district courts to challenge the Brady Act's provisions imposing duties upon them. Mack

[1] The waiting period and background check prescribed by the Act are not required in States that have permit systems meeting standards prescribed by the Act. 18 U.S.C. § 922(s)(1)(C), (D).

and Printz both invoked the Tenth and Fifth Amendments. Mack also challenged the Act as violating the Thirteenth Amendment.

Both district courts held that section 922(s)(2) of the Act, by imposing on the sheriffs a mandatory duty to conduct background checks, violated the Tenth Amendment as interpreted by the Supreme Court in *United States* v. *New York*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). *See Mack* v. *United States*, 856 F. Supp. 1372 (D. Ariz. 1994); *Printz* v. *United States*, 854 F. Supp. 1503 (D. Mont. 1994).[2] Neither court enjoined the provisions of the Act requiring CLEOs to explain the reasons for rejecting a purchase application, § 922(s)(6)(C), and requiring destruction of records, § 922(s)(6)(B). The *Printz* decision noted that the requirement of a statement of reasons became optional once the mandatory background check was invalidated, and that the provision for destruction of records was "de minimis."

In *Mack*, the district court also held that the criminal provisions of the Act applied to CLEOs, and were void for vagueness under the Fifth Amendment because they made it

[2] Four other district courts have ruled on whether the interim provisions of the Brady Act violates the Tenth Amendment. *See Romero* v. *United States*, 883 F. Supp. 1076 (D. La. 1995) (provisions of Brady Act requiring CLEOs to perform background checks, destroy sworn statements, and provide written response to those denied a handgun, held unconstitutional); *Frank* v. *United States*, 860 F. Supp. 1030 (D. Vt. 1994) (provision of Brady Act requiring CLEOs to perform background checks unconstitutional); *McGee* v. *United States*, 863 F. Supp. 321 (S.D. Miss. 1994) (same); *Koog* v. *United States*, 852 F. Supp. 1376 (W.D. Tex. 1994) (interim provisions not unconstitutional).

a crime for CLEOs to fail to make a "reasonable effort" to ascertain the lawfulness of a prospective handgun purchase. The *Printz* court held that the criminal provisions did not apply to CLEOs. Finally, the *Mack* court rejected Mack's Thirteenth Amendment challenge. Both district courts held that the invalid portions of the Act were severable, and accordingly refused to hold the entire Act unconstitutional.

In both actions, both sides appealed.[3] The sheriffs primarily dispute the holdings of severability, while the United States contends that the entire Act is constitutional.[4]

ANALYSIS

I. THE TENTH AMENDMENT CHALLENGE

No one in this case questions the fact that regulation of the sales of handguns lies within the broad commerce power of Congress.[5] The issue for decision is whether the

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[3] Handgun Control, Inc., et al., Senator Paul Simon, and the State of Ohio, have filed briefs as amici curiae in support of the United States. The Law Enforcement Alliance of America filed an amicus curiae brief in support of Mack.

[4] The United States also argues that, if the disputed provisions are unconstitutional, the injunction should prevent enforcement only against the two sheriffs because they did not bring class actions. Our disposition of the appeal makes it unnecessary for us to address this contention.

[5] Nor is any question raised by the Supreme Court's recent decision in *United States* v. *Lopez*, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), holding that Congress lacked authority under the commerce clause

manner in which Congress has chosen to regulate in the Brady Act violates the Tenth Amendment.

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." U.S. Const. amend. X. As a textual matter, therefore, the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States* v. *Darby*, 312 U.S. 100, 124, 85 L. Ed. 609, 61 S. Ct. 451 (1941). By its terms, the Amendment does not purport to limit the commerce power or any other enumerated power of Congress.

[1] In recent years, however, the Tenth Amendment has been interpreted "to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution." *South Carolina* v. *Baker*, 485 U.S. 505, 511 n.5, 99 L. Ed. 2d 592, 108 S. Ct. 1355 (1988). Thus, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York* v. *United States*, 505

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to enact the Gun Free School Zones Act. Unlike the statute in *Lopez*, the Brady Act regulates the *sale* of handguns and thus directly regulates commerce. The Brady Act is an amendment to a comprehensive federal scheme for the regulation of firearms sales that unquestionably affect interstate commerce. The legislative history of the Brady Act also contains findings that gun violence affects commerce, and we accept those findings. *See* H.R. Rep. 103-344, 103rd Cong., 1st Sess., *reprinted in* 1993 U.S.C.C.A.N. 1984, 1985.

U.S. 144, 157, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). The question before us is whether the Brady Act, by requiring CLEOs to perform background checks on handgun purchasers, transgressed such an implied limitation on federal power. We conclude that it did not.

There are numbers of ways in which the federal government is permitted to secure the assistance of state authorities in achieving federal legislative goals. First and most directly, the federal government may coerce the states and their employees into complying with federal laws of general applicability. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985).[6] Second, Congress may condition the grant of federal funds on the States' taking governmental action desired by Congress. *South Dakota* v. *Dole*, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987).

These broad categories do not exhaust, however, the means by which the federal government can enlist state employees in implementing federal programs. State judicial and administrative bodies may be required to apply federal law. *Testa* v. *Katt*, 330 U.S. 386, 91 L. Ed. 967, 67 S. Ct. 810 (1947); *FERC* v. *Mississippi*, 456 U.S. 742, 760-61, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982). The federal government may offer to preempt regulation in a given area, and permit the states to avoid preemption if they regulate in

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[6] It is true that this principle was rejected for certain state functions in *National League of Cities* v. *Usery*, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), but *National League of Cities* was expressly overruled in *Garcia*, 469 U.S. at 557, and *Garcia* remains the law controlling us.

a manner acceptable to Congress. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-91, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981).

The federal government has been permitted effectively to compel the states to issue registered rather than bearer bonds. *South Carolina* v. *Baker*, 485 U.S. 505, 514, 99 L. Ed. 2d 592, 108 S. Ct. 1355 (1988). Finally, the federal government has been permitted to require state utility regulators to consider prescribed federal standards in determining regulatory policies. *FERC* v. *Mississippi*, 456 U.S. at 765. In the course of the latter ruling, the Supreme Court referred to and rejected the "19th century view" that "Congress has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." *Id.* at 761 (quoting *Kentucky* v. *Dennison*, 65 U.S. 66, 24 How. 66, 107, 16 L. Ed. 717 (1861)). That view, said the Court, "is not representative of the law today." *Id.* "The federal government has some power to enlist a branch of state government . . . to further federal ends." 456 U.S. at 762.

[2] Against this background, there would appear to be nothing unusually jarring to our system of federalism in the Brady Act's requirement that CLEOs, during a five-year interim period, "make a reasonable effort to ascertain" the lawfulness of handgun purchases. The obligation imposed on state officers by the Brady Act is no more remarkable than, say, the federally-imposed duties of state officers to report missing children, 42 U.S.C. § 5779(a), or traffic fatalities, 23 U.S.C. § 402(a).

Mack and Printz, however, contend that the

precedential background set forth above was changed by *United States* v. *New York*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), and that the federal government is now flatly precluded from commanding state officers to assist in carrying out a federal program. We do not read *New York* that broadly.

Although we concede that there is language in *New York* that lends support to the view of Mack and Printz, that language must be interpreted in the context in which it was offered. *New York* was concerned with a federal intrusion on the States of a different kind and much greater magnitude than any involved in the Brady Act. The constitutional evil that *New York* addressed was one recognized by several of the cases already cited: the federal government was attempting to direct the States to enact their own legislation or regulations according to a federal formula.

New York involved the constitutional validity of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b et. seq. The part of the Act that the Court found to violate the Tenth Amendment was the so-called "take title" provision. Under that provision, a State that failed to regulate radioactive waste according to congressional standards was simply given title to the waste within its borders (which previously would have been in private hands). The waste then became the total responsibility of the State as owner. The alternative to this unacceptable prospect was for the State to legislate or regulate in a manner that Congress dictated, and "a direct order to regulate, standing alone, would . . . be beyond the power of Congress." *Id.* at 176. Thus, in response to the

government's argument that a strong federal interest supported the "take title" provision, the Court in *New York* stated: "whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable federal regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation." *Id.* at 178. In the same vein was the Court's conclusion after reviewing the debates at the time of the founding of the Constitution:

> We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. E.g., *FERC* v. *Mississippi*. . . . The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

Id. at 166.

Other decisions of the Supreme Court have recognized this proposition that the federal government cannot coerce States into performing the ultimately sovereign acts of legislating or regulating in a manner specified by the federal government. In *Virginia Surface Mining*, the Court noted that the provision of an alternative of federal regulation

rendered federal standards for state regulation permissible; because the State had a constitutional option, "there can be no suggestion that the Act commandeers the legislative processes by directly compelling them to *enact and enforce* a federal regulatory program." *Virginia Surface Mining*, 452 U.S. at 288 (emphasis added). Similarly, In *FERC* v. *Mississippi*, the Court noted that the federal command that the State "consider" federal alternatives was constitutional because "[t]here is nothing in PURPA 'directly compelling' the States to enact a legislative program." *FERC* v. *Mississippi*, 456 U.S. at 765.

New York, then, is best read as a case that draws a line already partly delineated in *Virginia Surface Mining* and *FERC* v. *Mississippi*: the federal government is not entitled to coerce the States into legislating or regulating according to the dictates of the federal government. Certainly *New York* did not purport to overrule *Virginia Surface Mining* or *FERC* v. *Mississippi*, or even to disavow the latter decision's rejection of the nineteenth century view that the federal government cannot command state employees. *New York* can be read consistently with these cases as an instance where "the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, cf. *New York*." *United States* v. *Lopez*, 131 L. Ed. 2d 626, 115 S. Ct. 1624, 1642 (1995) (Kennedy, J., concurring); *see also Board of Natural Resources* v. *Brown*, 992 F.2d 937, 947 (9th Cir. 1993) ("direct commands to the states to regulate according to Congress's instructions" "violate the Tenth Amendment as

interpreted by *New York*").[7]

There are good reasons for focusing Tenth Amendment concern on federal coercion of a State's enactment of legislation or regulations or creation of an administrative program. These activities are inherently central acts of a sovereign; if an area of state activity is to be protected from direct coercion by an implication drawn from the Tenth Amendment, legislating and regulating are prime candidates. "[T]he power to make decisions and to set policy is what gives the State its sovereign nature." *FERC* v. *Mississippi*, 456 U.S. at 761. There is a second reason, also, emphasized in *New York* itself. Democratic governments must be politically accountable. When the federal government requires the States to enact legislation, the enacted legislation is *state* legislation. Thus, it will likely "be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*, 505 U.S. at 169. When the federal government itself imposes a requirement on a state official, the requirement is more clearly an act of the federal government and thus does not, to the same extent, undermine political accountability.[8]

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[7] Thus we conclude that when the Court in *New York* stated that "[t]he Federal Government may not compel States to enact or *administer* a federal regulatory program," the Court meant "administer" in the sense of being in charge of a program and making policy decisions with respect to the program. *New York*, 505 U.S. at 188.

[8] We recognize that some individuals may criticize local officials for implementing federal regulations. But when federal regulations are imposed by the federal government, political accountability by the federal

[3] The Brady Act is not the kind of a federal mandate condemned by *New York*, nor does it present the concerns related above. The Brady Act does not embody a mandate to the "States" in the sovereign sense discussed in *New York*, *FERC* v. *Mississippi*, or *Virginia Surface Mining*. The Brady Act is a regulatory program aimed at individuals and not the States. It is true that, for a limited period of time, the Act requires state law enforcement officials, the CLEOs, to make reasonable efforts to assist in carrying out the federal program. But the CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations. They are not even being asked to produce a state policy, for which the state must bear political accountability. Instead, they are directed to serve for a temporary period as law enforcement functionaries in carrying out a federal program. Their activities are not alien to their usual line of work, and represent a minimal interference with state functions. In that sense, their duties are not different from other minor obligations that Congress has imposed on state officials.

Mack and Printz do not agree that the Brady Act's interference with their state duties is minimal. They point out that there are many factors that may make a prospective handgun purchase illegal under the Act. A purchase is unlawful, for example, if the purchaser is a fugitive, is an unlawful user of a controlled substance, has been adjudicated a mental defective, has been dishonorably discharged from the armed forces, has renounced his citizenship, or is under certain restraining orders involving an intimate partner. 18

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government for those regulations remains.

U.S.C. § 922(g). They also contend that it will be unduly burdensome to give reasons for rejecting a proposed purchase, within 20 days of being requested by the disappointed purchaser. *See* § 922(s)(6)(C). Mack and Printz point out that they are sheriffs in rural counties with limited staffs and resources. To research for all of these disabilities and to give reasons for rejection, Mack and Printz argue, will either take all of their time or so much of it that they will be unable to perform their regular county duties.

The government, on the other hand, argues that there is no requirement that CLEOs pursue all of these avenues of potential disqualification. They are enjoined only to "make a reasonable effort," § 922(s)(2), and the statute's only fixed requirement is a search in whatever recordkeeping systems are available and in a national system. *Id.* A reasonable effort, the government contends, might in the circumstances of Mack and Printz simply be a check of the existing computer records.

[4] We agree, and the government concedes, that there is likely to be some point at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment. Surely the federal government cannot stall the state government in its tracks by imposing all-consuming federal duties on the State's employees. We conclude, however, that the Brady Act does not approach that point. Mack and Printz have not demonstrated that the Act will interfere unduly with their duties. Indeed, to a considerable degree, the dispute over the magnitude of the burden imposed upon them is not ripe for resolution. Mack and Printz have not been subjected to any

interpretation of the Act, or any attempt to enforce it against them, that requires them to do more than check computer records. On this record, we cannot conclude that "a reasonable effort" inevitably requires more than this minimum for Mack and Printz. To perform such computer checks, and to explain reasons for rejection when and if disappointed purchasers so request, has not been shown to constitute the kind of interference with state functions that would raise Tenth Amendment concerns. It follows even more strongly that the minimal requirement of destruction of records presents no constitutional problem.

We also find no support for the Tenth Amendment claims of Mack and Printz in the cases from our circuit that they cite. *See Board of Natural Resources* v. *Brown*, 992 F.2d 937 (9th Cir. 1993); *United States* v. *Best*, 573 F.2d 1095 (9th Cir. 1978); *Brown* v. *Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975), *vacated as moot* 431 U.S. 99 (1977).[9] In *Board of Natural Resources* we held that the Forest Resources Conservation and Shortage Relief Act violated the Tenth Amendment. *Board of Natural Resources*, 992 F.2d at 947. That Act however - akin to the statute in *New York* - required the States to issue regulations and was far more demanding of state officials than the Brady Act. *See Board of Natural Resources*, 992 F.2d at 947. *Best* applied the National League of Cities governmental function test, *Best*, 573 F.2d at 1102, which has been abandoned. *See*

[9] Although the Supreme Court vacated *Brown*, on remand we stated: "Except as modified herein, we continue to regard, or once more adopt if necessary, our opinion in *Brown I* as the law of this circuit." *Brown* v. *EPA*, 566 F.2d 665, 666 (9th Cir. 1977). For reasons discussed later in the text, however, the precedential value of *Brown* is limited.

Garcia Metropolitan Transit Authority, 469 U.S. at 531 (overruling *National League of Cities*). And *Brown*, like *Board of Natural Resources*, involved regulations that clearly intruded upon a state's sovereignty, unlike the contested provisions of the Brady Act. *See Brown*, 521 F.2d at 829-830 (State had to develop and implement plan for implementing, enforcing, and maintaining national air standards). Additionally, *Brown* relied upon the Tenth Amendment view espoused in *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66, 107, 16 L. Ed. 717 (1861), *overruled by Puerto Rico* v. *Branstad*, 483 U.S. 219, 97 L. Ed. 2d 187, 107 S. Ct. 2802 (1987), that "the Federal Government . . . has no power to impose on a State officer, as such, any duty whatsoever . . . ." *See Brown*, 521 F.2d at 841. As the Supreme Court has made clear, the view espoused in *Kentucky* v. *Dennison* is no longer representative of the law. *FERC*, 456 U.S. at 761.[10] We therefore reject Mack's and

[10] The Law Enforcement Alliance of America, as Amicus Curiae, argues that the method by which the Brady Act was enacted violates the "structuralist" test articulated by *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), under which the States are protected from overreaching by the federal government primarily by "the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority." *Id.* at 552. The Court in *New York* has indicated that *Garcia* is limited to statutes that subject "a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160. But even if we assume that Garcia's structuralist test were applicable, we cannot accept the Law Enforcement Alliance's view that the Brady Act would fail the test. There is no showing that the States affected were "deprived of any right to participate in the national political process" or were "singled out in a way that left [them] politically isolated and powerless." *South Carolina* v. *Baker*, 485 U.S. at 513.

Printz's Tenth Amendment challenges to the Brady Act.[11]

II. THE FIFTH AMENDMENT VAGUENESS CHALLENGE

Section 924(a)(5) of the Act provides that "[w]hoever knowingly violates subsection (s)" of the Act is subject to fine or imprisonment or both. Mack and Printz contend that this provision subjects them to criminal liability for failing to "make a reasonable effort" to ascertain whether a particular purchase would violate the law, as required by section 922(s)(2). So construed, the criminal provision is unconstitutionally vague, according to Mack and Printz, because a person of reasonable intelligence has no way of knowing what may constitute a "reasonable effort."

It is not at all clear, however, that section 924(a)(5) is intended to apply to the Act's requirements imposed upon CLEOs. Indeed, the Montana district court viewed the criminal prohibition as ambiguous in that regard, and concluded that it did not apply to CLEOs.

We decline to reach this issue, however, because it is not ripe.[12] Mack and Printz have not been charged under the

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[11] Because we hold that the Brady Act does not violate the Tenth Amendment, we do not consider whether section 922(s)(2) is severable from the remainder of the Act, or whether the district courts erred in issuing injunctions that applied statewide.

[12] Mack and Printz also make a vagueness argument based on their exposure to civil proceedings. Neither Mack nor Printz has been subjected to civil proceedings, nor have they pointed to any civil proceeding to which they would be subject that would violate the Fifth Amendment. In any event, because this issue was not raised below, we decline to reach it.

Act with any criminal violations, nor are they likely to be. The United States represented during oral argument that the Justice Department's official position is that the criminal sanctions of the Brady Act do not apply to CLEOs. Because Mack and Printz do not face a "credible threat of prosecution," *San Francisco County Democratic Cent. Comm.* v. *Eu*, 826 F.2d 814, 821 (9th Cir. 1987), aff'd 489 U.S. 214, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989), there is no "case or controversy." *See Campbell* v. *Wood*, 18 F.3d 662, 680 (9th Cir.), cert. denied, 114 S. Ct. 2125 (1994).[13] In the extremely unlikely event that a criminal prosecution is one day brought against a CLEO, the constitutional objection may be raised in defense at that time.

[5] We therefore vacate the ruling of the District Court of Arizona that the criminal provisions apply to CLEOs and are void for vagueness, as well as the ruling of the District Court of Montana that the criminal provisions do

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[13] Mack and Printz also suggest that they need not face a reasonable threat of prosecution. None of the cases that they cite support this proposition, however. *See Board of Natural Resources*, 992 F.2d at 945 (plaintiff showed injury in fact); *Epperson* v. *Arkansas*, 393 U.S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968) (Court did not reach the justiciability issue); *Beacon Journal Pub. Co.* v. *Unger*, 532 F. Supp. 55, 58 (N.D. Ohio 1982) (plaintiff showed injury in fact); *Brown* v. *EPA*, 521 F.2d at 831 & 829 n.1 (the EPA had already given a notice of violation.); *Gentile* v. *State Bar*, 501 U.S. 1030, 115 L. Ed. 2d 888, 111 S. Ct. 2720 (1991) (plaintiff charged with violation); *Babbitt* v. *Farm Workers*, 442 U.S. 289, 299-300, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (even though plaintiffs did not face an imminent threat of prosecution, statute was "sure to work the injury alleged," and so Court found a case or controversy).

not apply to CLEOs. These claims are to be dismissed as unripe.

III. THE THIRTEENTH AMENDMENT CHALLENGE

Mack also challenges the Brady Act as violating the Thirteenth Amendment. The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII. According to Mack, section 922(s) requires him to perform labor for the United States or face legal sanctions, even though he is not a federal employee.

[6] Unlike a slave, however, Mack can quit work at any time. By doing so, he escapes all compulsion. The requirements of the Brady Act are not placed on Mack personally; the duties that are imposed attend the office. Thus the Brady Act does not coerce Mack "by improper or wrongful conduct" into service by causing and intending to cause him "to believe that he . . . has no alternative but to perform the labor." *Brogan* v. *San Mateo County*, 901 F.2d 762, 764 (9th Cir. 1990)(citation omitted). The fact that *Mack*, if he continues to be sheriff, must perform certain duties as a condition of his employment, does not violate the Thirteenth Amendment. *Cf. United States* v. *30.64 Acres of Land*, 795 F.2d 796, 800-01 (9th Cir. 1986) (requiring lawyers to perform pro bono services does not violate Thirteenth Amendment because requirement is a condition of practicing law).

CONCLUSION

The Brady Act violates neither the Tenth nor Thirteenth Amendment. Mack and Printz's Fifth Amendment vagueness challenge is not ripe. Accordingly, the district courts' injunctions prohibiting the United States from enforcing the disputed provisions of the Brady Act are vacated, and the district courts' judgments are reversed insofar as they invalidate portions of the Act. The portions of the cross-appeal in *Mack* and the appeal in *Printz* that challenge the district courts' rulings of severability are dismissed as moot; in all other respects the rulings challenged by Mack and Printz, are affirmed. The cases are remanded with instructions to dismiss the vagueness challenges as unripe. The United States is entitled to its costs on appeal.

No. 94-16940 (Appeal by United States) **REVERSED**.

No. 94-17002 (Cross-appeal by Mack) **AFFIRMED** in part and **DISMISSED** in part.

No. 94-36193 (Appeal by Printz) **AFFIRMED** in part and **DISMISSED** in part.

No. 95-35037 (Cross-Appeal by United States) **REVERSED**.

FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in parts II and III of the majority opinion, but I respectfully dissent from part I.[1]

This case makes palpable the notion that the states are just a part of the national government, a notion that was rejected when this country was founded. Congress has previously attempted to order the states to legislate or regulate in particular ways, and it has failed at that. *See, e.g., New York* v. *United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992); *Board of Natural Resources* v. *Brown*, 992 F.2d 937 (9th Cir. 1993); *cf. United States* v. *Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978). That is to say, Congress has failed when it has not given the states the option to avoid the intended yoke. *See, e.g., FERC* v. *Mississippi*, 456 U.S. 742, 766, 102 S. Ct. 2126, 2141, 72 L. Ed. 2d 532 (1982); see also *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981); *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975), vacated by 431 U.S. 99, 97 S. Ct. 1635, 52 L. Ed. 2d 166 (1977), *on remand* to 566 F.2d 665 (9th Cir. 1977). Even those determinations are not without their problems because government." *See FERC*, 456 U.S. at 782, 102 S. Ct. at 2150 (O'Connor, J., dissenting).

Now Congress has avoided those issues, but it has

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[1] Given the majority's decision, I see no need to discuss the criminal provisions of this law, the severability of the law's provisions, or the breadth of the injunctions imposed by the district courts.

done so by eliminating the niceties of the federal-state relationship entirely. Rather than ordering state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly. Under this new approach, the states have nothing to say about it. Their officials are ordered to become part of a federal gun control program at the state's own expense and are ordered to engage in various tasks necessary to administer that program. Those officials must make a "reasonable effort" to decide whether receipt of a weapon by a proposed transferee "would be in violation of the law" of the United States. 18 U.S.C. § 922(s)(2). Those efforts must include "research in whatever State and local recordkeeping systems are available *and* in a national system designated by the Attorney General." *Id.* (emphasis added). And the work must be done within five business days. Id. The officials must also dispose of the materials and may not make any use of them other than that directed by Congress. *Id.* § 922(s)(6)(B). They must provide written explanations for negative determinations upon request. *Id.* § 922(s)(6)(C). Presumably those officials must also adopt appropriate procedures for the carrying out of those functions. Perhaps that is not forced administration of the federal gun regulation program, but I fail to see why it is not.

Of course, the states are to bear the full cost of these tasks, and, unless the states adopt a local permit system, they cannot opt out of the federal program. If a state does not choose to engage in the regulation of this part of commerce - commerce in weapons - that makes no difference at all. In other words, state officials are conscripted by the federal government to fulfill its purposes and they can do nothing

about that.

The government argues that this is much more respectful of state sovereignty than the legislation struck down in *New York*. I do not agree. If the Tenth Amendment has anything to do with the separate sovereign dignity of the states, it is difficult to see how that dignity is not undermined by the reality of a command that they commit their resources to the carrying out of this kind of federal policy, whether they like it or not.

Moreover, we are not dealing with a situation where a state seeks to stay in the business of regulating commerce in weapons. Quite the contrary. This legislation impacts states that do not wish to do so. I assume that the Supreme Court meant what it said when it said:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several states a residuary and inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment.
>
> Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.

New York, 505 U.S. at ___, 112 S. Ct. at 2434-35 (citations omitted).

This legislation is a step toward concentrating power in the hands of the federal government, for it treats state officials and workers as if they were mere federal employees. It makes every CLEO's office an office of the federal bureaucracy, funded by the states, but directed from Washington. The time to stop this journey of a thousand miles is at the first step.[2]

Therefore, I respectfully dissent from the majority's determination that the statute does not violate the Tenth Amendment.

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[2] *Cf.* Lao-tzu, Bartlett's Familiar Quotations 65, quotation 1, (1980).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-36193 & 95-35037
CT/AG# CV-94-00035-M-CCL

JAY PRINTZ, Sheriff/Coroner,
Ravalli County, Montana

Plaintiff/Appellant-
Cross-Appellee

v.

UNITED STATES OF AMERICA

Defendant/Appellee-
Cross-Appellant

JUDGMENT
[Filed January 3, 1996]

APPEAL FROM the United States District Court for the District of Montana (Missoula).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Missoula) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in No. 94-36193 be, and hereby is AFFIRMED in part and DISMISSED in part and in No. 95-35037 is REVERSED.

Filed and entered September 8, 1995.

Lou Aleksich, Jr.
Clerk

Marilyn G. Sewell
Deputy Clerk

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CA Nos. 94-16940/94-17002
DC No. CV-94-00113-JMR

RICHARD MACK, Sheriff of Graham County, Arizona,

Plaintiff-Appellee/
Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant/
Appellee,

CA. Nos. 94-36193/95-35037
DC No. CV-94-00035-M-CCL

JAY PRINTZ, Sheriff/Coroner, Ravalli County, Montana,

Plaintiff-Appellant/
Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee/
Appellant.

ORDER

[Filed Dec. 19, 1995]

BEFORE: CHOY, CANBY AND FERNANDEZ, CIRCUIT JUDGES.

The panel has voted unanimously to deny both petitions for rehearing.

The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a vote on whether to rehear the matters en banc. Fed. R. App. R. 35.

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

Cathy A. Catterson
Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

CV 94-35-M-CCL

SHERIFF/CORONER JAY PRINTZ
Ravalli County, Montana,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

OPINION AND ORDER

[Filed May 16, 1994]

This matter came before the court for hearing on Plaintiff's applications for temporary restraining order and preliminary injunction requesting that the court enjoin enforcement of Section 102(a) of Pub. L. 103-159, 107 Stat. 1536 (1993), codified at 18 U.S.C. § 922(s). Plaintiff was

represented at the hearing by Stephen P. Halbrook, Esq., and James A. Haynes, Esq., and the government was represented by Michael Sitcov, Esq. At the hearing, the parties stipulated to Plaintiff's request that the hearing be consolidated with the trial on the merits.[1] After considering all testimony, affidavits and arguments submitted by the parties, the court enters the following opinion and order on the merits of this case.

BACKGROUND

On November 30, 1993, Congress enacted the Brady Handgun Violence Prevention Act ("Act"), as an amendment to the Gun Control Act of 1968. The interim provisions of the Act require that before a handgun dealer can transfer a handgun to a buyer, he or she must, in certain cases,[2] transmit a copy of a statement received from the buyer to the chief law enforcement officer ("CLEO") in the jurisdiction and wait for the earlier of five days or the CLEO's approval

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[1] The court also considered the amicus curiae brief submitted by Handgun Control, Inc., Center to Prevent Handgun Violence, Major Cities Chiefs of Police, International Association of Chiefs of Police, National Association of Police Organizations, Fraternal Order of Police, Police Foundation, Federal Law Enforcement Officers Association, Police Executive Research Forum, National Troopers Coalition, and National Organization of Black Law Enforcement Executives. All further references to this group of organizations will be designated ("HCI").

[2] No background check or waiting period is required in certain circumstances. *See* 18 U.S.C. § 922(s)(1)(B)-(F).

of the transfer.[3] *See* 18 U.S.C. § 922(s)(1)(A)(i)(I), (i)(IV), and (ii). During the waiting period, the CLEO is directed to make a reasonable effort to ascertain whether the transferee's receipt or possession of the handgun would violate the law. 18 U.S.C. § 922(s)(2). The Act also directs that if the CLEO does not determine that the transferee is ineligible to receive the handgun, the CLEO must destroy the statement within twenty days. 18 U.S.C. § 922(s)(6)(B)(i). However, if the CLEO determines that the transferee is ineligible, and the transferee requests, the CLEO must provide the reasons for the determination within twenty days. 18 U.S.C. § 922(s)(6)(C).

Plaintiff requests that this court enter a declaratory judgment that the Act is unconstitutional and permanently enjoin it on the ground that the commands to the CLEOs are beyond the powers delegated to Congress by the United States Constitution, Article 1, Section 8, and violate the Tenth Amendment to the Constitution. In addition, Plaintiff requests the same relief as to 18 U.S.C. § 922(s)(2) on the ground that it is vague and violates the due process clause of the Fifth Amendment.

DISCUSSION

This is not a case about the Second Amendment. This case turns on the proper relationship between the federal

[3] The licensed importer, manufacturer, or dealer attempting to transfer the handgun, referred to as the "transferor," is also subject to other requirements. *See* 18 U.S.C. § 922(s)(1)(A)(i)(II) and (III), (s)(4), (s)(5), and (s)(6)(A).

government and the several states, and in particular, on the constitutionality of federally imposed, unfunded mandates to the states.

STANDING:

At the forefront of the government's argument in opposition is its claim that Plaintiff lacks standing or is not authorized by state law to bring this action. The government asserts that Plaintiff sustains no injury as a result of the Act and therefore, lacks standing to sue and has no authority to bring this action in his official capacity under Montana law. The government also questions whether Plaintiff is the real party in interest, impliedly concluding that the action should have been brought by Ravalli County.[4]

In response, Plaintiff points out that entities created by state law were plaintiffs in three leading Tenth Amendment civil cases.[5] As to the right to bring suit under Montana law, Plaintiff contends it is "hornbook law" that he has the implied right to sue to enforce his legally prescribed

[4] The court received testimony at the hearing from a Ravalli County Commissioner that the County was present to join the suit if necessary to establish standing.

[5] Plaintiff cites to *New York v. United States*, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (Petitioners state of New York and two counties thereof), *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) (Plaintiff San Antonio Metropolitan Transit Authority, a public mass transit authority organized on a countywide basis and recognized by state law), and *National League of Cities v. Usery*, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976) (Plaintiffs individual cities and states and organizations thereof).

duties as a public officer. 63A Am.Jur.2d § 316 *Public Officers and Employees* (1984).

Standing raises the question whether the "litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Allen v. Wright*, 468 U.S. 737, 750-51, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)). At an "irreducible constitutional minimum," standing is comprised of three elements: an "injury in fact," or an actual or imminent invasion of a concrete and particularized legally-protected interest; a causal connection between the injury and the conduct complained of; and the likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351, 364 (1992) (citations omitted).

Plaintiff in his official capacity as sheriff is required to perform those duties prescribed by state law and takes an oath to this effect. Mont. Code Ann. §§ 7-32-2121(12) and 2-16-211(1). Failure to perform legally prescribed duties with respect to a court of justice constitutes malfeasance in contempt of the court's authority. Mont. Code Ann. § 3-1-501(1)(c).

At the hearing hereon, Plaintiff testified that enforcement of the Act forces him to reallocate already limited resources such that he is unable to carry out certain duties prescribed by state law. This results in "injury in fact" to Plaintiff in that the Act requires him to violate his oath

and possibly act in contempt of the court's authority.[6] In addition, there is no question that there is a causal connection between Plaintiff's injury and enforcement of the Act and that a favorable decision will redress Plaintiff's complaint. Therefore, at an "irreducible constitutional minimum," Plaintiff has standing.

As the government notes, however, plaintiff-public officers suing in their official capacity raise additional standing issues, most notably, identification of the real party in interest. The government cites to four United States Supreme Court cases in its brief discussion of this issue but fails to provide any analysis thereof. Although the cases cited support the government's position in that the moving party was found to lack standing, none of the cases is analogous to the present case.[7] Rather, *Board of Education*

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[6] Also, as Plaintiff argues, the mere perception of the CLEO as anything other than law-abiding constitutes injury. Furthermore, as discussed later herein, that the Act forces the CLEO to bear some of any public disapproval of the Act is injurious to Plaintiff in his capacity as an elected official.

[7] *Karcher v. May*, 484 U.S. 72, 98 L. Ed. 2d 327, 108 S. Ct. 388 (1987) (Appellant state legislators who participated in lawsuit in their official capacity as presiding officers of state legislature, but no longer held those offices, lacked authority to appeal on behalf of legislature.); *Bender v. Williamsport Area School District*, 475 U.S. 534, 543-44, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986) (Plaintiff-school board member "had no personal stake in outcome of litigation" and therefore did not have standing to file a notice of appeal, distinguishing Board of *Education v. Allen*, 392 U.S. 236, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968).); *Kentucky v. Graham*, 473 U.S. 159, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985) (Personal and official-capacity suits distinguished in the context of fee awards under 42 U.S.C. § 1988.); *Brandon v. Holt*, 469 U.S. 464, 83 L. Ed. 2d 878, 105 S. Ct. 873 (1985) (In § 1983 cases, a judgment

v. Allen, 392 U.S. 236, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968), is on point.

Appellants there, members of local boards of education who took an oath to support the United States Constitution, sought declaratory and injunctive relief against the enforcement of an allegedly unconstitutional New York statute. The Court found that Appellants' belief that the statute was unconstitutional forced them to choose between violating their oath or refusing to comply with the statute, the latter of which would likely result in expulsion from office and a reduction in state funding for their school districts. *Board of Education*, 392 U.S. at 241 n.5. Based on these findings, the Court summarily disposed of the standing issue by ruling that "there can be no doubt that Appellants thus have a 'personal stake in the outcome of this litigation.'" *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962)).

The present case is analogous to *Board of Education* in that Plaintiff believes he is forced to choose between violating his oath or violating the Act, and in either case, possibly subjecting himself to contempt proceedings.[8] In

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against a public servant in his official capacity is a judgment against the entity represented, provided the entity receives notice and an opportunity to respond.).

[8] The present case is distinguishable from *Coleman v. Miller*, 307 U.S. 433, 83 L. Ed. 1385, 59 S. Ct. 972 (1939), in that a writ of mandamus against the county or the state would not remedy Plaintiff's complaint insofar as the federal government's unconstitutional commandeering of state officials. *See Bender v. Williamsport Area School Dist.*, 475 U.S. at 544 n.7.

these circumstances, there is no doubt that Plaintiff has a personal stake in the outcome of the litigation such that he has standing in this action.

Having analyzed the constitutional implications of standing, the court turns to the government's remaining contention, namely, that Plaintiff has no authority to bring this action in his official capacity under Montana law.[9] The government argues that there is no Montana statute authorizing Plaintiff to bring this action, as required by Mont. Code Ann. § 7-1-2102.[10] However, consistent with Plaintiff's position, the Montana Supreme Court has adopted 67 C.J.S. *Officers* § 250 (1978), which states the general rule that "public officers have capacity to sue commensurate with their public trust or duties without express statutory authority." *See State v. School Dist. No. 13*, 116 Mont. 294, 151 P.2d 168 (1944).

Plaintiff in *School Dist. No. 13* was a county superintendent who sought a writ of injunction against the school district's board of trustees, among others, as a relator for the state of Montana. Defendants contended that Plaintiff lacked standing as a relator because he was not a taxpayer within the district.

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[9] As a general rule, the capacity of a plaintiff to sue as a representative is determined by the law of the state in which district court is held. Fed. R. Civ. P. 17(b). In this case, therefore, Plaintiff's official capacity to sue is determined under Montana law.

[10] Under Mont. Code Ann. § 7-1-2102, county officers can sue in their name of office for the benefit of the county when authorized by law.

The court began its analysis of the standing issue by recognizing that Montana law requires plaintiff to supervise the public schools in his county and that a legal proceeding is plaintiff's only method of responding to resistance to his actions in carrying out this duty. The court then stated, "It may be laid down as a general principle, that the limit of the power of a public officer is that statute conferring the power, and what further power is necessarily implied in order to effectuate that which is expressly conferred." *School Dist. No. 13*, 116 Mont. at 299-300, 151 P.2d at 170 (quoting *In re Farrell*, 36 Mont. 254, 262, 92 P. 785, 787 (1907)). The court went on to state the general rule of law that "public officers ordinarily need not be authorized by statute to bring suit, having implied authority to do so co-extensive with their public trusts and duties." *Id.* (quoting 46 C.J. *Officers* § 333 (1928)). Based on the authorities cited, the court ruled that "it was the officer's duty and not his right which impels his action, and he need not, like a private citizen, show a personal interest in the controversy in order to institute a judicial action."[11] *Id.*

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[11] Prior to its decision in *School Dist. No. 13*, the Montana Supreme Court relied on the predecessors to Mont. Code Ann. § 7-1-2102 in ruling plaintiffs did not have standing and the county was the real party in interest. *State v. Mullendore*, 53 Mont. 109, 161 P. 949 (1916). The court concluded Plaintiffs were not authorized to bring the action in their official capacity on behalf of the county since there was no provision of law authorizing such action. Id., 53 Mont. at 117, 161 P. at 952. Plaintiffs were commissioners of Custer County seeking a writ of certiorari for review and modification of certain liabilities of Custer and Fallon Counties as relators for the State of Montana.

School Dist. No. 13 and Mullendore are distinguishable under the personal stake analysis in *Board of Education*. While Plaintiff-county superintendent in *School Dist. No. 13* was compelled to prosecute his claim by virtue of the ministerial duty he was charged with performing,

In this case, there is no question that Plaintiff's duties under state law forced the filing of this action. Therefore, in accordance with the Montana Supreme Court's analysis in *School Dist. No. 13*, Plaintiff has the inherent right to bring this suit.

STATUTORY INTERPRETATION:

Before reaching Plaintiff's claim that the Act violates Article I, Section 8 and the Tenth Amendment, it is necessary to interpret several of the Act's provisions to determine whether the criminal penalty provision applies to CLEOs and whether mandatory duties are imposed upon CLEOs.

1. Criminal Penalties

The parties disagree as to whether Congress intended the criminal penalty provision of the Act to apply to CLEOs. The criminal penalty provision is codified at 18 U.S.C. § 924(a)(5) and provides:

> Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $ 1,000.00, imprisoned for not more than 1 year, or both.

Plaintiff argues that the plain language of the statute, and in the alternative, that the broad definition of "whoever"

Plaintiffs in *Mullendore* merely sought review of their decision as to apportionment of the counties' liabilities.

as used throughout Title 18, shows that the penalty provision applies to CLEOs.

"The meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the court is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917). In this case, when Section 924(a)(5) of Title 18 United States Code[12] is read together with Section 922(s) and (t), it is unclear to whom the term "whoever" applies. That term is never defined. In addition, the Act contains a specific provision exempting CLEOs from civil damages. The inclusion of that provision at least raises the issue of whether CLEOs are subject to the more severe criminal penalty provision. Therefore, the court concludes that the language of the Act is unclear on this point.

Since there is no plain meaning, the statute must be subjected to the process of statutory interpretation. *See* 2A Norman J. Singer, *Sutherland on Statutory Construction* § 45.02 (5th ed. 1992). An overwhelming majority of judicial opinions interpret statutes by looking to legislative intent. Id. § 45.05. Plaintiff argues that the court should look outside the Act and the amended chapter at examples elsewhere in Title 18 and other criminal provisions to determine the intended meaning of the word "whoever." However, Plaintiff's examples themselves show that the term "whoever"

[12] All future section references are to Title 18, United States Code.

has different meanings within the federal criminal code.[13]

A review of the legislative history shows that the 1991 version of the Act, which was passed by the House but never enacted into law, contained the same criminal penalty provision, but did not require that CLEOs make a reasonable effort to ascertain within five days whether a transfer would be illegal. When the reasonable effort language was added to the Act in 1992, the legislative history appears to be silent on whether the criminal provision would also apply to CLEOs. The court agrees that such silence supports the conclusion that Congress did not intend to apply Section 924(a)(5) to CLEOs.

In addition, as previously stated, the Act contains a specific provision exempting CLEOs from civil damages. It would be incongruous to insulate a CLEO from civil damages, but not from more severe criminal penalties.

From the foregoing, the court concludes that it was the intent of Congress in passing the Act that the criminal provision of Section 924(a)(5) would not apply to violations by CLEOs of any duties imposed by Section 922(s)(2). Even if the intent of Congress on this point were still ambiguous, the court would conclude under the rule of lenity and to avoid serious constitutional problems, that the criminal provision does not apply to CLEOs.

The rule of lenity requires that penal statutes be

[13] *See* 18 U.S.C. § 1111(b) (applies to everyone); 18 U.S.C. § 2234 (applies only to law enforcement officers).

construed strictly against the government. *See Busic v. United States*, 446 U.S. 398, 406, 64 L. Ed. 2d 381, 100 S. Ct. 1747 (1980). In this case, if it is still ambiguous whether the criminal provision applies to CLEOs, the rule requires that the statute be construed to be inapplicable. *See Liparota v. United States*, 471 U.S. 419, 427, (1985).

Furthermore, where an otherwise acceptable construction of a statute would raise serious constitutional problems, the statute must be construed to avoid such problems unless such construction is plainly contrary to the intent of Congress. *DeBartolo v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988). As stated by the Assistant Attorney General for the Office of Legal Counsel, "It would be difficult to prosecute a CLEO for failing to make 'a reasonable effort,' and such prosecution could be subject to a Fifth Amendment due process challenge." Op. Off. Legal Counsel (March 16, 1994). Since construing the criminal penalty provision to apply to CLEOs would raise serious due process problems for vagueness, the provision must be construed to not apply to CLEOs.

For the foregoing reasons, the court concludes that the criminal penalty provision of the Act, codified at 18 U.S.C. § 924(a)(5), does not apply to violations by CLEOs, in their capacity as such, of any duties imposed by Section 922(s)(2).

2. Civil Mandates

Plaintiff contends that the following provisions of the Act contain mandatory duties each CLEO must perform:

(s)(2) A [CLEO] to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General;[14]

(s)(6)(B) Unless the [CLEO] to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law -

> (i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);[15] and

> (s)(6)(C) If a [CLEO] determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days

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[14] Hereinafter referred to as the "ascertainment/background check provision."

[15] Hereinafter referred to as the "statement destruction provision."

after receipt of the request.[16]

The government agrees that both the destruction of records provision and the letter of reasons provision, contain mandatory duties that must be performed by CLEOs.[17] The government argues, however, that the ascertainment/background check provision does not contain a mandatory duty.

Plaintiff argues that the background check provision requires CLEOs to perform some type of background check in every case, although he does not contend that a particular type of background check must be performed. The government, on the other hand, argues that the ascertainment/background check provision requires only that the CLEO determine whether or not conducting a check would be a reasonable diversion of the sheriff's resources.[18] Transcript of Consolidated Hearing at 63, (April 7, 1994). The government's argument boils down to an interpretation that the duties prescribed by the ascertainment/background check provision are discretionary.[19]

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[16] Hereinafter referred to as the "letter of reasons provision."

[17] It should be noted that the government only interprets the letter of reasons provision to be mandatory after a CLEO determines that doing some form of background check is reasonable.

[18] The only criteria suggested in the statute is "availability" of recordkeeping systems. *See* 18 U.S.C. § 922(s)(2).

[19] The government's argument that a CLEO must only determine whether conducting a background check is a reasonable diversion of his or her resources, requires the CLEO to compare the value of background checks with the value of whatever activity would lose the resources.

By interpreting the Act to be discretionary, the government tries to avoid serious Tenth Amendment problems. Although this court must generally construe the Act to avoid serious constitutional problems, it may not do so where such a construction is plainly contrary to the intent of Congress. *Bartolo Corp.*, 485 U.S. at 575. In this case, the government's construction of the ascertainment/background check provision is plainly contrary to the intent of Congress.

The legislative intent as revealed by committee reports

Thus, CLEOs could decide (or presumably they could feel compelled to decide because of their state statutory mandates) that every activity currently performed by their offices is more important than any background check, and therefore, could elect to perform no check at all in every case. Carried to its logical conclusion then, the government's interpretation of the background check provision makes it effectively discretionary.

This being said, the government has apparently undermined this interpretation of the provision. In oral argument, the government argued that each CLEO's determination of whether a background check is reasonable, is non-reviewable. Transcript at 71. However, the government then stated that a CLEO could not decide that he or she was not going to perform background checks because the CLEO does not like them. Transcript at 68. The government lawyer went on to state that he imagined that in such a situation, the federal government could bring a mandamus action in federal court against the CLEO to force him or her to determine what type of effort is reasonable. Transcript at 72-73.

Whether a CLEO "likes" background checks could in large part be based on that individual's understanding of the effectiveness of background checks at stopping transfers that violate the law. Thus, on the one hand, the government argues for an interpretation that requires CLEOs to make a value determination as to whether background checks or other activities should be performed, but on the other hand, appears to argue that CLEOs cannot make a determination as to the value of background checks.

is highly persuasive. Singer, *supra*, § 48.06. They are entitled to greater weight in interpretation than less formal historical sources. *International Telephone and Telegraph Corp. v. General Telephone & Electronics Corporation*, 518 F.2d 913, 921 (9th Cir. 1975).

Throughout the House Judiciary Committee Report, references are made to the mandatory nature of the ascertainment of eligibility and the background checks. In the "Summary and Purpose" section is stated, "Local law enforcement officials are required to use the waiting period to determine whether a prospective handgun purchaser has a felony conviction or is otherwise prohibited from buying a gun." H.R. Rep. No. 344, 103rd Cong., 1st Sess., at 7 (1993). Clearly, a determination of eligibility is required and some form of background check on which to make the determination is implied by this statement.

In the section entitled "Brief Explanation of H.R. 1025" the report states, "The bill **requires** local law enforcement officials to make a reasonable effort to ascertain whether the prospective purchaser is forbidden from buying the handgun. This background check **must** be conducted within five business days." *Id.* at 10-11 (emphasis added). If a reasonable effort could mean no effort, the Committee could easily have inserted the words, "if any," after the words "This background check," in the second sentence. No such proviso was made. That sentence clearly assumes that a background check will be performed.

Finally, in the section entitled "Section-by-Section Analysis" the report states, "This Section provides that before

a Federal firearms licensee transfers a firearm to a non-licensee, a background check of the prospective purchaser **will be conducted**." *Id.* at 17 (emphasis added). This statement leaves little doubt that Congress intended mandatory background checks.

If any doubt did remain, it was eliminated by the Judiciary Committee's rejection of an amendment to change "shall" to "may" in the ascertainment/background check provision. The rejection of an amendment generally indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment. *See Tahoe Regional Planning Agency v. McKay*, 769 F.2d 534, 538 (9th Cir. 1985).

The sponsor of the amendment, Congressman Steve Schiff, stated that his amendment "proposed to make the performance of the background check an option, rather than a requirement . . . . My amendment would . . . insert 'may,' thus making it an option for state and local agencies who do have the law enforcement resources to perform the background check, to do so." H.R. Rep. No. 344, Additional Dissenting Views at 38-39. The proposed amendment was defeated.

The government's argument that the Act does not require any background check where a CLEO determines that he or she does not have sufficient resources to perform one seems to have again been specifically rejected by the House of Representatives. After passage of the Act, Representative Schiff moved to recommit the bill to committee because it placed an unfunded mandate on state law enforcement. He

argued that either the requirement for action should be removed, or the action should be funded by Congress. Nevertheless, the motion to recommit was denied. 139 Cong. Rec. H9143-44 (daily ed. Nov. 10, 1993) (statement of Rep. Schiff).

From the foregoing analysis, the court concludes that the Act mandates CLEOs perform three tasks upon receiving notice from a transferor: ascertain whether receipt of the handgun would be in violation of law; perform a background check; and if the CLEO ascertains that the transferee is eligible to receive the handgun, destroy the statement within twenty days; but if the CLEO ascertains that the transferee is ineligible, and the transferee requests, provide the reasons for the determination within twenty days.

ARTICLE I, SECTION 8, AND TENTH AMENDMENT:

Plaintiff claims that the Act mandates duties on the CLEOs of the places of residence of handgun purchasers exceeding Congress' authority under Article 1, Section 8, of the United States Constitution and violating the Tenth Amendment. The analyses under Article 1, Section 8, and the Tenth Amendment parameters are mirror images of each other. *See New York v. United States*, 112 S.Ct. 2408, 2417, 120 L.Ed.2d 120, 137 (1992).

In *FERC v. Mississippi*, the Court made plain that the Federal Government has some power to enlist the judicial branch of state government to further federal ends. 456 U.S. 742, 762 (1982). But the Court left open the question whether other branches could be so enlisted. *Id.* at 761-62.

Then, in *New York*, the Court made clear that the legislative processes of the states cannot be commandeered by directly compelling them to enact and enforce a federal regulatory program. 112 S.Ct. at 2420, 120 L.Ed.2d at 140 (quotation omitted). In addition, from the plain text of that opinion and the logical conclusion of its analysis, this court concludes that the ascertainment/background check provision of the Act exceeds the powers delegated to Congress and violates the Tenth Amendment of the Constitution because it substantially commandeers state executive officers and indirectly commandeers the legislative processes of the state to administer a federal program.

New York involved the validity of a statute which in part required states, unless they provided for radioactive waste produced within their borders according to Congress' directives, to take title to and possession of the waste and be liable for damages suffered for failure to do so promptly. Thus, this provision of the statute offered state governments the choice of either regulating according to the instructions of Congress or accepting ownership of waste. *New York*, 112 S.Ct. at 2428, 120 L.Ed.2d at 150. Since the Constitution did not authorize Congress to impose either option as a free-standing requirement, the Court held that Congress lacked the power to offer states the choice between the two. *Id.*

The government argues that both choices given to the states in *New York* compelled them to legislate and implement a program dictated by Congress and it is the compelled legislation that was found to be constitutionally offensive. The government misreads *New York*. The

language in the opinion made clear that the constitutional principles of state sovereignty restrict the federal government not only from compelling the states to enact a federal regulatory program, but also from **administering** such a program. *New York*, 112 S.Ct. at 2435, 120 L.Ed.2d at 158.

The government is clearly correct in that one of the problems with the statute in *New York* is that it compelled states to legislate. One of the choices facing the states was to regulate in accordance with the federal statute, and the Court devoted most of the opinion to explaining the unconstitutionality of that provision. But that was not the only problem. The other choice confronting the states was simply to take title to the waste. If a state exercised that choice, no legislation was explicitly required.

In ruling the "take-title" choice unconstitutional, the Court stated that that type of provision would commandeer state governments into the service of federal regulatory purposes. *New York*, 112 S.Ct. at 2428, 120 L.Ed.2d at 150. In this case, the states are not even given a choice. They are simply commandeered through their CLEOs into administering a portion of the Act, to achieve the Act's purposes. Thus, like the take-title provision contained in the statute in *New York*, the Act contains provisions inconsistent with the Constitution's division of authority between federal and state governments.

Although the Act does not directly require state legislatures to regulate in a particular field or in a particular way, the Court's analysis behind its conclusion that the compelled legislation provision in *New York* was

unconstitutional, is instructive in this case. In *New York*, the Court first discussed the precedent supporting the proposition that Congress may not simply "commandee[r] the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program." 112 S.Ct. at 2420, 120 L.Ed.2d at 140 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)). The Court went on to ground that proposition in the intent of the framers, concluding that the Constitution confers upon Congress the power to regulate individuals, not the states. *New York*, 112 S.Ct. at 2422, 120 L.Ed.2d at 144.

It is questionable, however, whether the framers intended that the federal government could not rely upon state officers to perform some of its tasks. As Justice O'Connor, the author of *New York*, wrote in dissent in *FERC*:

> After the Convention, several thinkers suggested that the National Government might rely upon state officers to perform some of its tasks. Madison for example, thought that Congress might rely upon state officials to collect national revenue. The Federalist No. 45, pp 312-13 (J. Cooke ed 1961). None of those suggestions, however, went so far as to propose congressional control of state legislative power. The suggestions, moreover, seemed to assume that the States would consent to national use of their officials. See also w. Anderson, The Nation and the States, Rivals or Partners? 86-87 (1957) (noting that first Congress rejected proposals to rely upon state officials to enforce federal law and suggesting that

> this decision to leave "the states free to work out, and to concentrate their attention and resources upon, their own functions" has become part of our constitutional understanding).

456 U.S. at 796 n.35 (O'Connor, J., dissenting). Historically then, the question whether the mandates included in the Act would be permitted by the Constitution is in doubt.

The Court in *New York* next went on to analyze the issue of whether state legislatures could be compelled to regulate, under a principle of accountability. The Court noted that there are methods by which Congress may urge a state to adopt a legislative program consistent with federal interests. *New York*, 112 S.Ct. at 2423, 120 L.Ed.2d at 144. First, under Congress' spending power, "Congress may attach conditions on the receipt of federal funds." *Id.* (quoting *South Dakota v. Dole*, 483 U.S. 203, 206, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987)). Second, where Congress has the authority to regulate private activity under the commerce clause, the Court has recognized Congress' power to offer states the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. *Id.* (citing *Hodel*, 452 U.S. at 288; *FERC*, 456 U.S. at 764-65). The Court stated that in either case, as by any other permissible method of encouraging a state to conform to federal policy choices, the residents of the state retain the ultimate decision as to whether or not the state will comply. *New York*, 112 S.Ct. at 2424, 120 L.Ed.2d at 145.

The Court appears to discuss accountability in two different terms, i.e., taking responsibility for the popularity or

unpopularity of a particular decision,[20] and in terms of using legislative resources, such as time and money, to solve problems important to the state citizens.[21] HCI argues that since Congress passed the Act, and no further state legislative action is required, the federal government remains fully accountable to the electorate for all aspects of the gun control process. There are two major problems with HCI's argument: it overlooks the effect the unpopularity of the Act could have on CLEOs; and it does not address accountability in terms of using legislative resources to solve problems important to state citizens.

CLEOs may be held accountable under the Act to the extent it is an unpopular decision in their jurisdictions. Under the Act, CLEOs make up the visible front line of administrators of the Act. Thus, they could become associated with the Act and bear the brunt of its unpopularity. CLEOs will also bear the brunt of any incorrect determinations they make. Transferees who are falsely determined to be prohibited persons, and are forced to go through the inconvenience of remedying their erroneous

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[20] *New York*, 112 S.Ct. at 2424, 120 L.Ed.2d at 145 (important that federal government make decisions in full view of public, so federal officials suffer the consequences of unpopular decisions.)

[21] *New York*, 112 S.Ct. at 2424, 120 L.Ed.2d at 145 (if state residents would prefer their government to devote its attention and resources to problems other than those deemed important by congress, they may choose to have the federal government rather than the state bear the expense of a federally mandated regulatory program).

denial, may hold the CLEO responsible.[22] On the other hand, the community may hold the CLEO responsible for his or her failure to prevent the transfer of a handgun to a prohibited person.[23] It is true that some CLEOs are appointed and therefore may be somewhat insulated from any direct repercussions from the public. Others, however, like Sheriff Printz are elected and therefore, are directly accountable to local voters.

More important, both CLEOs and state and local elected bodies are indirectly required to allocate their resources to implement the Act instead of using those resources to address problems important to their constituents. CLEOs must allocate resources to perform the background checks and to learn pertinent federal and state law to be able to ascertain whether a transfer violates the Act. They must also write rejected transferees and destroy records. Resources for those activities must either come from an increase in each CLEO's department budget, or be diverted from another area of operation. If the department's budget is not increased, CLEOs will be held accountable for decreases in services in other areas.

State and local elected bodies may also be held accountable in this way. It is true that state legislatures and local councils and commissions need not implement a regulatory program under the Act, and members of those

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[22] Of course, CLEOs cannot be held liable under the Act for any action at law for damages. 18 U.S.C. § 922(s)(7)(B).

[23] Again, CLEOs cannot be required to pay civil damages under the Act for such failure. 18 U.S.C. § 922(s)(7)(A).

bodies may, therefore, initially devote their attention to other problems that are important to their constituents. However, those legislative bodies fund the department operations of the CLEOs. Thus, they are faced with the choice of: forcing the CLEOs to divert resources from another area of operation, diverting resources from another budget area into each CLEO's department budget, or increasing the CLEOs' department budgets through raising taxes. As a result, local citizens will receive fewer services from each CLEO's department, fewer services from other agencies, or higher state and local taxes. Indirectly commandeering the legislative processes of the states in this way may lead to the perception among voters that state and local governments have become less efficient and less responsive to their needs. Accordingly, members of these elected bodies may be held accountable.

The corollary to state and local governments being held financially accountable for the Act is that the federal government will not be. Only in this sense does the Act "pass the buck" to the states. The federal officials will receive some of the accolades or criticism for their program, but they will not suffer any of the consequences for the cost.

Turning now to the government's contentions, it argues that the Supreme Court's Tenth Amendment jurisprudence cannot be understood solely on the basis of *New York* and urges this court to review a number of guiding principles the government claims have emerged from other decisions in this area.

The government first claims the Act is constitutional

since it is not aimed solely at the states, but instead governs both public and private actors. It is true that where Congress subjects the states to generally applicable laws, additional analysis is required. *See New York*, 112 S.Ct. at 2420, 120 L.Ed.2d at 140. In the case cited by the government, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), and the cases cited in *New York*,[24] generally applicable laws were found where the same requirements were imposed on the states as on private actors. However, the Act does not subject the states to the same requirements as private actors. Instead, CLEOs are singled out to perform distinct duties. Thus, the mandatory provisions of the Act do not constitute a generally applicable law.

The government next argues that the Act is constitutional because the residual state sovereignty that the Tenth Amendment protects is secured primarily by the states' representation in Congress. *See Garcia*, 469 U.S. at 552. Thus, any substantive limitations on Congress' exercise of its commerce clause power must "be tailored to compensate for possible failing in the national political process rather than to dictate a sacred province of state autonomy." *Id.* at 554 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 236, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983)). It appears that the Court has rejected the "process" test in cases such as this. Representation in Congress did not preclude the Court in *New York* from declaring a portion of that statute unconstitutional. In addition, the dissent in *New York* confirmed that the "process" test was rejected. 112 S.Ct. at

[24] *See New York*, 112 S.Ct. at 2420, 120 L.Ed.2d at 140.

2444, 120 L.Ed.2d at 169 (White, J., dissenting.).

The government next argues that the Act is constitutional because it merely directs a state to consider taking action. This court has already rejected that interpretation of the Act and decided that the Act requires CLEOs perform certain tasks including ascertaining whether receipt of the handgun would be in violation of law, performing a background check, destroying the statement, and providing reasons for finding the transferee ineligible.[25] The Act is, therefore, distinguishable from the duties discussed by the government in *FERC*.

The government next argues that the Act is constitutional because it only directs CLEOs to do the type of activity they ordinarily engage in. The government relies on the cases of *Testa v. Katt*, 330 U.S. 386, 91 L. Ed. 967, 67 S. Ct. 810 (1947) and *FERC* in an attempt to establish the validity of this principle.

In *Testa*, the Court upheld a federal program which in relevant part gave jurisdiction over claims arising under a federal statute to state as well as federal courts. The Court held that states could not refuse jurisdiction in their courts to enforce the statute. However, in *New York*, the Court made

[25] The court notes, however, that once the mandatory ascertainment/background check provision is invalidated and the requirements under that provision become optional, the mandates of the letter of reasons provision will also become optional depending on whether the states choose to perform background checks. Since the mandates of the letter of reasons provision become optional, that provision does not commandeer the states in any way and is therefore constitutional. *See FERC*, 456 U.S. at 764-65; *Hodel*, 452 U.S. at 264.

clear that *Testa* "involved no more than an application of the Supremacy Clause's provision that federal law 'shall be the supreme law of the land,' enforceable in every state. 112 S.Ct. at 2429-30, 120 L.Ed.2d at 152.

In *FERC*, the Court interpreted one of the provisions of the statute at issue to "simply require the Mississippi authorities to adjudicate disputes arising under the statute." 456 U.S. at 760. It then noted that, "Dispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission." *Id.* This was not the principle relied upon to find that statutory requirement constitutional, however. In the next sentence, the Court states that *Testa v. Katt* is instructive and **controlling** on that point. *Id.* The provision in *FERC* then, was compelled by the Supremacy Clause, and not by Article 1, Section 8 or the Tenth Amendment.

Even if the government correctly stated that a federal statute does not violate the constitution where it only directs states to engage in the types of activities they ordinarily engage in, I find that CLEOs do not ordinarily engage in all of the types of activities directed by the Act. The government, assuming unconstitutionality of the ascertainment/background check provision, states that the Act only requires CLEOs to conduct criminal history checks, which is a traditional police function, write letters, and destroy records. The government defines the types of activities required too narrowly.

As previously discussed, people other than convicted felons are forbidden from purchasing a handgun. It is also

unlawful for a fugitive from justice, an unlawful user of a controlled substance, an adjudicated mental defective, an illegal alien, and a person who has been dishonorably discharged from the armed forces, to purchase a handgun. 18 U.S.C. § 922(d). Importantly, CLEOs are also required under the Act to "ascertain" whether the receipt would be in violation of federal law. Making legal determinations based upon federal law is a discretionary function and not a type of activity in which CLEOs regularly engage.

Finally, the government argues that the mandated activities are *de minimis*, apparently implying that they should be found to be constitutional for that reason.[26] Plaintiff responds that *New York* provided for no *de minimis* exception. Plaintiff is correct, no such exception was explicitly addressed, but the Court had no reason to reach the issue under the circumstances in that case. Its underlying analysis, however, based on the accountability principle supports such an exception.

To the extent CLEOs need not divert resources to implement a federal program, they need not cut back on other services. Furthermore, where few additional resources are necessary, state and local elected bodies need not face the choice of presiding over a reduction in services by the CLEO's department, diverting resources from another budget

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[26] HCI points out that without a *de minimis* exception, several ministerial statutes would also be invalidated under this analysis. *See* 42 U.S.C. § 5779(a) (requiring state law enforcement agencies to report cases of missing children to the Department of Justice); 23 U.S.C. § 402(a) (requiring states to report traffic fatality data to the Department of Transportation).

area, or raising taxes. Therefore, it seems to follow that a federal requirement that states perform *de minimis* activities would not exceed the power of Congress or violate the Tenth Amendment.

However, the impact of the mandates of the Act is far from de minimis. The ascertainment/background check provision is most burdensome. CLEOs must perform these background checks on every potential transferee,[27] must determine the applicable law on which the ascertainments are made,[28] and must determine whether each transfer violates the law. These are substantial undertakings, some involving the exercise of discretion, which may be performed -- if at all -- only with great effort and the expenditure of unfunded resources.

While the ascertainment/background check provision

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[27] Plaintiff testified that there were 101 handgun transactions in Ravalli County from the date of the statute's effective date on February 28, 1994, through April 6, 1994.

[28] Such a determination of the law is not always easily made. *See United States v. Reynolds*, CR 91-2-H-CCL (D.Mont. Aug. 17, 1992) (probationer who never had his civil rights specifically suspended was not "convicted of a crime punishable by a term exceeding one year" 18 U.S.C. § 921(a)(20); *United States v. Eaton*, CR 93-22-M-CCL, (D.Mont. Aug. 27, 1993) (law of state of predicate offense, not state of prosecution for federal firearm's violation, determinative of whether defendant had civil rights restored within meaning of 18 U.S.C. § 921(a)(20); *United States v. Brooks*, CR 93-21-M-CCL (D.Mont. Mar. 29, 1994) (probationer who was ordered by state sentencing judge to comply with conditions of probation had right to carry a firearm "specifically" suspended as required by state law, was convicted of crime punishable by term exceeding one year as that term is defined in 18 U.S.C. § 921(a)(20)) (certified to Montana Supreme Court).

is plainly not *de minimis*, the same cannot be said for the statement destruction provision, standing alone. That important provision simply requires CLEOs to destroy records and statements within twenty days and can be considered *de minimis* in the absence of the other mandates.

In summary, the Act differs from the statute in *New York* in that state legislatures are not directly commandeered into implementing a regulatory scheme that may not reflect each state electorate's preferences. However, like the statute in *New York*, it is state and local officials who will have to administer the program, and bear the attendant accountability. In addition, state and local governments are also held accountable for the Act by being conscripted into bearing the financial burden for administering the Act, lessening their ability to provide other services to their citizens and leading to the appearance of inefficiency.

SEVERABILITY:

Having determined that the ascertainment/background check provision exceeds the power of Congress, the court must consider whether it is severable from the rest of the Act.

"The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law." *New York*, 112 S.Ct. at 2434, 120 L.Ed.2d at 157 (quoting *Alaska Airlines, Inc. v. Brock*, 480

U.S. 678, 684, 94 L. Ed. 2d 661, 107 S. Ct. 1476 (1987)). Two questions must, therefore, be answered to satisfy the severability test. *Board of Natural Resources v. Brown*, 992 F.2d 937, 948 (9th Cir. 1993). First, the court must determine whether the Act which remains after the unconstitutional provisions are excised is "fully operative." *Id.* Second, the court must determine whether Congress would have enacted the constitutional provisions of the Act independently of the unconstitutional provisions. *Id.*

To determine whether the constitutional provisions of the Act are fully operative, the court must focus on whether the unconstitutional provisions are "functionally independent" from the remainder of the Act. *Id.* "An unconstitutional portion of the Act has been deemed functionally independent if 'its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation.'" *Id.* (quoting *United States v. Jackson*, 390 U.S. 570, 586, 20 L. Ed. 2d 138, 88 S. Ct. 1209 (1968)). Conversely, an unconstitutional provision is not considered "functionally independent" if the valid and invalid provisions are so intertwined that the court would have to rewrite the law to allow it to stand. *Id.* (quotation omitted).

The elimination of subsection (s)(2) does not alter the substantive reach of the Act because the provisions affecting the targets of the Act, the transferors and transferees, would be left intact. In addition, the basic operation remains unchanged. Transferees would still be required to provide sworn statements. Transferors would still be required to provide those statements to CLEOs. CLEOs would still be required to destroy the statements and, if they chose to

perform background checks, to write letters to rejected transferees explaining why they may not purchase a handgun. Transferors may not transfer a handgun unless five days have passed or one of the other provisions of subsection (s)(1) is met.

Finally, to sever subsection (s)(2) from the rest of the Act, the court need not rewrite the law to allow it to stand. CLEOs will no longer be required to comply with the ascertainment/background check provision. However, the process will be in place so that if CLEOs are required or permitted (and choose to do so) by state law to perform the ascertainment/background check function, they can do so.

Since the Act, absent the unconstitutional provision, is fully operative as law, the court must inquire whether Congress would have enacted the constitutional provisions of the Act independently of the unconstitutional provisions. *Id.* In making this determination, the relevant inquiry is whether the statute will function in a manner consistent with the intent of Congress. Id. (quotation omitted). The inquiry is eased when Congress has explicitly provided for severance by including a severability clause in the statute. *Alaska Airlines*, 480 U.S. at 686. The applicability of a severability clause creates a presumption that Congress did not intend the validity of the statutes in question to depend on the validity of the constitutionally offensive provision. *Id.* (citations omitted). In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute. *Id.*

In his initial brief, Plaintiff argued that since the Act

itself does not contain a severability clause, the presumption does not apply. The government and HCI point out, however, that the Gun Control Act, which the Act amends, contains a severability clause. Thus, the question arises whether a severability clause contained in an underlying statute, applies to an amendment to that statute.

The Supreme Court faced a similar issue in *Alaska Airlines*. That case addressed the constitutionality of a portion of an Employee Protection Program ("EPP"), which in turn was part of the Airline Deregulation Act of 1978. The Airline Deregulation Act did not contain a severability clause, but it amended the Federal Aviation Act of 1958, which did. The Court did not reach the question of whether the severability clause applied, but it did state that its applicability to the EPP was in doubt, "because, unlike many sections the deregulation act, the EPP does not amend provisions of the aviation act or any other pre-existing statute, but instead establishes a new program." *Alaska Airlines*, 480 U.S. at 686, n.8.

In this case, unlike the provision at issue in *Alaska Airlines*, the Act is clearly intended to amend the Gun Control Act. The Act does not create a new program, but instead provides a means for implementing the Gun Control Act's prohibition against sales to certain classes of buyers. In addition, the Act is codified in Chapter 44 at 18 U.S.C. § 922(s), which is within the scope of the severability clause. That clause is codified at 18 U.S.C. § 928, and reads,

> If any provision of this chapter or the application thereof to any person or circumstances is held invalid

> the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Therefore, the court concludes that the severability clause contained in the Gun Control Act applies to the Act.

In spite the presumption from the severability clause that Congress would have enacted the constitutional provisions of the Act independently of subsection (s)(2), Plaintiff argues that the Act would not have been so enacted. Plaintiff argues that Congress would not have enacted the Act if it only contained an optional ascertainment/background check provision, because the Act was defeated in Congress on several occasions in previous sessions when the background check was only optional. However, the only evidence cited by Plaintiff tending to show that the optional background check provision was the reason the Brady bill was defeated is a statement by a single Congressman.[29]

In addition, Plaintiff goes to some length to show that Congress rejected an optional ascertainment/background check provision, in favor of one that was mandatory. That

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[29] Plaintiff reports that Congressman Zimmer stated, "Two years ago I voted against an earlier version of the Brady bill, which required a 7-day waiting period for handgun purchases with only an optional background check. I voted instead for affirmative legislation that provided for an instant, mandatory background check . . . .

The legislation we are voting on today addresses my principal objections to the 1991 Brady bill. The background check is no longer optional and the waiting period will be eliminated as soon as a national instant check system can be implemented. 139 Cong.Rec. H9107-08.

Congress chose a mandatory provision instead of one that was optional does not mean that Congress preferred no Act to one that contained only the optional provision. Since there is not strong evidence that Congress intended otherwise, the court concludes that subsection (s)(2) can be excised from the remainder of the statute.

CONCLUSION

By requiring the states to carry out an unfunded federal mandate, Congress has substantially commandeered state executive officers and indirectly commandeered the legislative processes of the states to administer a federal program. Accordingly, the court concludes that Congress has exceeded the powers delegated it by Article 1, Section 8 and violated the Tenth Amendment of the Constitution, and

HEREBY ORDERS that judgment shall enter declaring section 922(s)(2) of Title 18, United States Code unconstitutional and void, and permanently enjoining the United States from enforcing said provision. All other provisions of the Act are severable, and are unaffected by this order and the judgment to be hereafter entered.

The clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 16th day of May, 1994.

/s/ CHARLES C. LOVELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

SHERIFF/CORONER JAY PRINTZ,
Ravalli County, Montana,

Plaintiff,

CV 94-35-M-CCL

v.

UNITED STATES OF AMERICA

Defendant.

JUDGMENT
[Filed May 16, 1994]

IT IS HEREBY DECLARED, ORDERED, ADJUDGED, AND DECREED that 18 U.S.C. § 922(s)(2) exceeds the power of Congress and violates Article 1, Section 8, and the Tenth Amendment of the United States Constitution, and is hereby declared unconstitutional and void.

The United States of America is permanently enjoined

and restrained from enforcing said provision against the Plaintiff, Sheriff Jay Printz, or any other chief law enforcement officer.

The clerk is directed forthwith to notify the parties of entry of this judgment, and the same be served upon Defendant.

Done and dated this 16th day of May, 1994.

Lou Aleksich, Jr.
Clerk

/s/ CHARLES C. LOVELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

CV 94-35-M-CCL

SHERIFF/CORONER JAY PRINTZ,
Ravalli County, Montana,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

[Filed Nov. 1, 1994]

The court has issued its final judgment declaring 18 U.S.C. § 922(s)(2) unconstitutional and enjoining defendant from enforcing this law against chief law enforcement officers ("CLEO's). The court found subsection (s)(2) to violate Article I, Section 8 and the Tenth Amendment to the Constitution as directly commandeering state executive officers and indirectly commandeering the legislative precess

of the state to administer a federal program. While subsection (s)(2) may well have been valid had it been directed to an agency of the federal government, it instead, improperly, was an unfunded mandate on state and local governments.

Now, the government moves the court for an order altering and amending by restricting the scope of the court's judgment to the plaintiff. Interestingly, the government did not broach this argument until long after the court had ruled, and after the substantial change in position that occurred among the various CLEOs as a result of the court's ruling. There is some little authority in support of the government's position. See Bresgal v. Brock, 843 F.2d 1163, 1170-71 (9th Cir. 1987). See also Zepeda v. United States I.N.S., 753 F.2d 719 (1983) (Wallace, C.J.). On the other hand, this court does have the power to issue a nationwide injunction, see Bresgal, 843 F.2d. at 1170, and there are compelling reasons to do so here.*

This court has declared the statute to be

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* This court's initial decision and judgment was followed within months of rulings in similar cases in four other federal District Courts. Three courts have declared subsection (s)(2) unconstitutional and enjoined its enforcement, and one federal District Court has Declared it constitutional. The attorneys are seemingly conducting a poll of selected federal district courts that is creating confusion. This approach seems unreasonably wasteful of overtaxed district court resources. See Bresgal, 843 F.2d at 1170 (citing Hi-Craft Clothing v. NLRB, 660 F.2d 910, 912 n. 1 (3d Cir. 1981). One would think counsel ought to cease their pursuit of this redundant litigation in the district courts and seek either appellate review or statutory amendment.

unconstitutional on its face. The statute is, therefore, as unconstitutional any place in the country as it is in Ravalli County, Montana.

Moreover, some time after this court ruled, another District Court of this circuit reached a similar result and also imposed a nation-wide injunction. Mack v. United States, No. 94-113 TUC-JMR, 1994 WL 323909 (D. Ariz., June 29, 1994). That court has since denied the government's motion to alter judgment to restrict the injunction to the sole plaintiff in that case. Mack v. United States, No. CV 94-113 TUC-JMR (D. Ariz. August 24, 1994). Apparently, only one nation-wide injunction issuing from a federal District Court in the Ninth Circuit is insufficient to satisfy the government. But my ruling today, whether denying or granting the government's motion, will have no practical effect because there is in force a nation-wide injunction issued by a federal District Court of the Ninth Circuit after my injunction. Under these circumstances, there is a substantial element of mootness to the government's motion to reconsider. See Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976) (question moot when injury cannot be redressed by a favorable judicial decision).

Accordingly,

IT IS ORDERED that the government's motion to alter the court's judgment of May 16, 1994, in this case is DENIED.

The clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 1st day of November, 1994.

Lou Aleksich, Jr.
Clerk

Dianne E. Mantz
Deputy

/s/ CHARLES C. LOVELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

CV 94-35-M-CCL

SHERIFF/CORONER JAY PRINTZ,
Ravalli County, Montana,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

[Filed Dec. 16, 1994]

Before the court is the Defendant's motion for relief from this court's order of November 1, 1994, or in the alternative for a stay pending appeal. This is the second time herein that Defendant has moved for modification of an order of this court based on authority which was in existence prior to entry of the order but not cited to the court by the Defendant until thereafter -- a poor practice, indeed.

IT IS ORDERED that the Defendant's motion for relief from the court's order of November 1, 1994, is

GRANTED to the extent hereinafter provided.

IT IS FURTHER ORDERED that the second paragraph of the May 16, 1994, Judgment in this case is modified to read as follows:

> The United States of America is permanently enjoined and restrained from enforcing said provision against any chief law enforcement officer in the District of Montana.

IT IS FURTHER ORDERED that the Defendant's motion for stay pending appeal is DENIED.

The clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 16th day of December, 1994.

Lou Aleksich, Jr.
Clerk

Dianne E. Mantz
Deputy Clerk

/s/ CHARLES C. LOVELL
United States District Judge

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution

Article I, § 8, clause 3:

The Congress shall have power . . .

To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes . . . .

Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statute

107 STAT. 1536 (Nov. 30, 1993)

PUBLIC LAW 103-159
103d Congress

An Act

To provide for a waiting period before the purchase of a handgun, and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any firearm.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled,

TITLE I--BRADY HANDGUN CONTROL

SEC. 101.--SHORT TITLE.

This title may be cited as the "Brady Handgun Violence Prevention Act".

SEC. 102. FEDERAL FIREARMS LICENSEE REQUIRED TO CONDUCT CRIMINAL BACKGROUND CHECK BEFORE TRANSFER OF FIREARM TO NON-LICENSEE.

(a) INTERIM PROVISION.--

(1) IN GENERAL.--Section 922 of title 18, United States Code, is amended by adding at the end the following:

"(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun to an individual who is not licensed under section 923, unless--

"(A) after the most recent proposal of such transfer by the transferee--

"(i) the transferor has--

"(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

"(II) verified the identity of the transferee by examining the identification document presented;

"(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

"(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

"(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

"(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

"(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the

transferee or of any member of the household of the transferee;

"(C)(i) the transferee has presented to the transferor a permit that--

"(I) allows the transferee to possess or acquire a handgun; and

"(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

"(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

"(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

"(E) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

"(F) on application of the transferor, the Secretary has certified that compliance with subparagraph (A)(i)(III) is impracticable because--

"(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the

number of square miles of land area of the State does not exceed 0.0025;

"(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

"(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

"(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

"(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only--

"(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

"(B) a statement that the transferee--

"(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year;

"(ii) is not a fugitive from justice;

"(iii) is not an unlawful user of or addicted

to any controlled substance (as defined in section 102 of the Controlled Substances Act);

"(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

"(v) is not an alien who is illegally or unlawfully in the United States;

"(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

"(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

"(C) the date the statement is made; and

"(D) notice that the transferee intends to obtain a handgun from the transferor.

"(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to--

"(A) the chief law enforcement officer of the place of business of the transferor; and

"(B) the chief law enforcement officer of the place of residence of the transferee.

"(5) Any transferor who receives information, not

otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

"(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

"(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law--

"(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

"(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

"(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

"(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the

individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

"(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages--

"(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

"(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

"(8) For purposes of this subsection, the term 'chief law enforcement officer' means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

"(9) The Secretary shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.".

(2) HANDGUN DEFINED.--Section 921(a) of title 18, United States Code, is amended by adding at the end the following:

"(29) The term 'handgun' means--

"(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand;

and

"(B) any combination of parts from which a firearm described in subparagraph (A) can be assembled.".

(b) PERMANENT PROVISION.--Section 922 of title 18, United States Code, as amended by subsection (a)(1), is amended by adding at the end the following:

"(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless--

"(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

"(B)(i) the system provides the licensee with a unique identification number; or

"(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

"(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d)(1) of this title) of the transferee containing a photograph of the transferee.

"(2) If receipt of a firearm would not violate section 922 (g) or (n) or State law, the system shall--

"(A) assign a unique identification number to the transfer;

"(B) provide the licensee with the number; and

"(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

"(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if--

"(A)(i) such other person has presented to the licensee a permit that--

"(I) allows such other person to possess or acquire a firearm; and

"(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

"(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

"(B) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

"(C) on application of the transferor, the Secretary has certified that compliance with paragraph (1)(A)

is impracticable because--

"(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

"(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

"(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

"(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

"(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Secretary may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any

license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than $5,000.

"(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages--

"(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

"(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.".

(c) PENALTY.--Section 924(a) of title 18, United States Code, is amended--

(1) in paragraph (1), by striking "paragraph (2) or (3) of"; and

(2) by adding at the end the following:

"(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1,000, imprisoned for not more than 1 year, or both.".

SEC. 103. NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM.

(a) DETERMINATION OF TIMETABLES .--Not later than 6 months after the date of enactment of this Act, the

Attorney General shall--

(1) determine the type of computer hardware and software that will be used to operate the national instant criminal background check system and the means by which State criminal records systems and the telephone or electronic device of licensees will communicate with the national system;

(2) investigate the criminal records system of each State and determine for each State a timetable by which the State should be able to provide criminal records on an on-line capacity basis to the national system; and

(3) notify each State of the determinations made pursuant to paragraphs (1) and (2).

(b) ESTABLISHMENT OF SYSTEM.--Not later than 60 months after the date of the enactment of this Act, the Attorney General shall establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law.

(c) EXPEDITED ACTION BY THE ATTORNEY GENERAL.--The Attorney General shall expedite--

(1) the upgrading and indexing of State criminal history records in the Federal criminal records system maintained by the Federal Bureau of Investigation;

(2) the development of hardware and software

systems to link State criminal history check systems into the national instant criminal background check system established by the Attorney General pursuant to this section; and

(3) the current revitalization initiatives by the Federal Bureau of Investigation for technologically advanced fingerprint and criminal records identification.

(d) NOTIFICATION OF LICENSEES.--On establishment of the system under this section, the Attorney General shall notify each licensee and the chief law enforcement officer of each State of the existence and purpose of the system and the means to be used to contact the system.

(e) ADMINISTRATIVE PROVISIONS.--

(1) AUTHORITY TO OBTAIN OFFICIAL INFORMATION.--Notwithstanding any other law, the Attorney General may secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code or State law, as is necessary to enable the system to operate in accordance with this section. On request of the Attorney General, the head of such department or agency shall furnish such information to the system.

(2) OTHER AUTHORITY.--The Attorney General shall develop such computer software, design and obtain such telecommunications and computer hardware, and employ such personnel, as are necessary to establish and operate the system in accordance with this section.

(f) WRITTEN REASONS PROVIDED ON REQUEST.--If the national instant criminal background check system determines

that an individual is ineligible to receive a firearm and the individual requests the system to provide the reasons for the determination, the system shall provide such reasons to the individual, in writing, within 5 business days after the date of the request.

(g) CORRECTION OF ERRONEOUS SYSTEM INFORMATION.--If the system established under this section informs an individual contacting the system that receipt of a firearm by a prospective transferee would violate subsection (g) or (n) of section 922 of title 18, United States Code or State law, the prospective transferee may request the Attorney General to provide the prospective transferee with the reasons therefor. Upon receipt of such a request, the Attorney General shall immediately comply with the request. The prospective transferee may submit to the Attorney General information to correct, clarify, or supplement records of the system with respect to the prospective transferee. After receipt of such information, the Attorney General shall immediately consider the information, investigate the matter further, and correct all erroneous Federal records relating to the prospective transferee and give notice of the error to any Federal department or agency or any State that was the source of such erroneous records.

(h) REGULATIONS.--After 90 days' notice to the public and an opportunity for hearing by interested parties, the Attorney General shall prescribe regulations to ensure the privacy and security of the information of the system established under this section.

(i) PROHIBITION RELATING TO ESTABLISHMENT OF REGISTRATION SYSTEMS WITH RESPECT TO FIREARMS.--No department, agency, officer, or employee of the United States may--

(1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or

(2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons, prohibited by section 922 (g) or (n) of title 18, United States Code or State law, from receiving a firearm.

(j) DEFINITIONS.--As used in this section:

(1) LICENSEE.--The term "licensee" means a licensed importer (as defined in section 921(a)(9) of title 18, United States Code), a licensed manufacturer (as defined in section 921(a)(10) of that title), or a licensed dealer (as defined in section 921(a)(11) of that title).

(2) OTHER TERMS.--The terms "firearm", "handgun", "licensed importer", "licensed manufacturer", and "licensed dealer" have the meanings stated in section 921(a) of title 18, United States Code, as amended by subsection (a)(2).

(k) AUTHORIZATION OF APPROPRIATIONS.--There are authorized to be appropriated, which may be appropriated from the Violent Crime Reduction Trust Fund established by section 1115 of title 31, United States Code, such sums as are necessary to enable the Attorney General to carry out this section.

SEC. 104. REMEDY FOR ERRONEOUS DENIAL OF FIREARM.

(a) IN GENERAL.--Chapter 44 of title 18, United States Code, is amended by inserting after section 925 the following new section:

"§ 925A. Remedy for erroneous denial of firearm

"Any person denied a firearm pursuant to subsection (s) or (t) of section 922--

"(1) due to the provision of erroneous information relating to the person by any State or political subdivision thereof, or by the national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act; or

"(2) who was not prohibited from receipt of a firearm pursuant to subsection (g) or (n) of section 922,

may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, or against the United States, as the case may be, for an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be. In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.".

(b) TECHNICAL AMENDMENT.--The chapter analysis for chapter 44 of title 18, United States Code, is amended by inserting after the item relating to section 925 the following new item:

"925A. Remedy for erroneous denial of firearm.".

SEC. 105. RULE OF CONSTRUCTION.

This Act and the amendments made by this Act shall

not be construed to alter or impair any right or remedy under section 552a of title 5, United States Code.

SEC. 106. FUNDING FOR IMPROVEMENT OF CRIMINAL RECORDS.

(a) USE OF FORMULA GRANTS.--Section 509(b) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3759(b)) is amended--

(1) in paragraph (2) by striking "and" after the semicolon;

(2) in paragraph (3) by striking the period and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(4) the improvement of State record systems and the sharing with the Attorney General of all of the records described in paragraphs (1), (2), and (3) of this subsection and the records required by the Attorney General under section 103 of the Brady Handgun Violence Prevention Act, for the purpose of implementing that Act.".

(b) ADDITIONAL FUNDING.--

(1) GRANTS FOR THE IMPROVEMENT OF CRIMINAL RECORDS.--The Attorney General, through the Bureau of Justice Statistics, shall, subject to appropriations and with preference to States that as of the date of enactment of this Act have the lowest percent currency of case dispositions in computerized criminal history files, make a grant to each State to be used--

(A) for the creation of a computerized criminal history record system or improvement of an existing system;

(B) to improve accessibility to the national instant criminal background system; and

(C) upon establishment of the national system, to assist the State in the transmittal of criminal records to the national system.

(2) AUTHORIZATION OF APPROPRIATIONS.--There are authorized to be appropriated for grants under paragraph (1), which may be appropriated from the Violent Crime Reduction Trust Fund established by section 1115 of title 31, United States Code, a total of $200,000,000 for fiscal year 1994 and all fiscal years thereafter.